Applicant Details

First Name	**Anna**
Last Name	**Ferron**
Citizenship Status	**U. S. Citizen**
Email Address	**aferron@uw.edu**
Address	**Address** **Street** **4423 Corliss Ave N** **City** **Seattle** **State/Territory** **Washington** **Zip** **98103** **Country** **United States**
Contact Phone Number	**2068192418**

Applicant Education

BA/BS From	**Boston College**
Date of BA/BS	**May 2020**
JD/LLB From	**University of Washington School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=94803&yr=2009**
Date of JD/LLB	**June 1, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Other**
Other Bar Admission(s)	**Tulalip Tribal Bar**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Howard, Maureen A.
mahoward@uw.edu
616-6236
Fan, Mary
mdfan@uw.edu
206-543-2261
Assaf, Fadi
fadi.assaf@nwjustice.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ANNA FERRON

Seattle, WA | (206) 819-2418 | aferron@uw.edu

June 18, 2023

The Honorable Morgan Christen
222 W. 7th Avenue
Anchorage, AK 99513

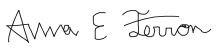
Dear Judge Christen,

I am a rising third year law student at the University of Washington, where I rank in the top 10% of my class. I write to apply for a clerkship in your chambers for the 2025-2026 term. I am particularly interested in clerking in the Ninth Circuit as I hope to practice as a plaintiff side or impact litigation attorney in federal court. A clerkship and career in Alaska particularly interest me because of my interest in working in Federal Indian Law and the prevalence of cases relating to Alaskan Native tribal rights.

I am confident that my legal writing and research skills, as well as my interest in social justice and Federal Indian Law, would be an asset to your chambers. The breadth of my work experience reflects both a commitment to tackling social justice issues and a commitment to honing the skills that will make me an effective advocate and judicial clerk. My background in Economics and non-profit policy work allowed to me to develop a professional approach to research that focuses on depth and clarity. As the Chief Notes & Comments Editor of the Washington Law Review, I have been able to use my legal writing skills to help others produce clear and concise legal scholarship and to improve my own writing skills through this process. My Note on the Washington and Federal Excessive Fines Clause as it relates to the unhoused population of Washington will be published in October of 2023. Further, my work with the Indian tribes in the Northwest has allowed me to gain a deeper understanding of the relation between tribes and the federal government and how this plays out in federal court.

My resume, transcripts, and writing sample are enclosed, as well as letters of recommendation from Professor Mary Fan, Professor Maureen Howard, and my supervisor at Northwest Justice Project, Fadi Assaf. I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Sincerely,



Anna E. Ferron

ANNA FERRON

Seattle, WA | (206) 819-2418 | aferron@uw.edu

EDUCATION

University of Washington School of Law | Seattle, WA
Juris Doctor **|** GPA: 3.84 (Top 10%) Anticipated June 2024

- *Washington Law Review*, Chief Notes & Comments Editor
  - Pending Publication: Taking the *Long* Road: The Excessive Fines Clause as a Tool for Protecting Washington's Unsheltered Population
- Tribal Public Defense Clinic, Member of the Tulalip Tribal Bar
- Justice John Paul Stevens Fellow
- CALI Excellence Award: Federal Courts & The Federal System

Boston College | Chestnut Hill, MA
Bachelor of Arts, Economics May 2020

- Minors in Theology, Social Impact Management
- Bellarmine Pre-Law Review, 4Boston Volunteer at Pine Street Inn, Men's Shelter

EXPERIENCE

Terrell Marshall, Seattle, WA Anticipated June 2023-Sept. 2023

- Expect to be drafting motions and conducting research for class actions suits in federal court in employment, consumer protection, and civil rights.

Tulalip Tribal Court Public Defender's Office, Tulalip, WA Sept. 2022-May 2023

- Appeared in court on behalf of clients in arraignments and other hearings with UW Tribal Clinic.
- Negotiated with prosecutors to reach plea agreements and assisted with case strategy.
- Researched legal issues based on Tulalip Tribal Code and other sources of Tribal law.

Northwest Justice Project, Seattle, WA June 2022–Aug. 2022
Legal Intern, CHEER Unit

- Researched legal issues and advised clients on issues pertaining housing, consumer, and debt.
- Drafted motions, discovery requests, complaints, and other documents submitted to the courts.

Jesuit Volunteer Corps, Catholic Charities of San Antonio, TX Aug. 2020–June 2021
Family Self-Sufficiency Case Worker

- Conducted intakes of those at risk of homelessness or other economic hardship and provided financial assistance and resources aimed at self-sufficiency (e.g., job training).
- Researched government financial assistance programs, assessed client eligibility for these programs, and advocated for clients to receive assistance.

English for New Bostonians (ENB), Boston, MA June 2019–Aug. 2019
Public Policy Intern

- Drafted ENB's policy agenda to improve migrant communities access to English learning by performing data analysis and working with community stakeholders.
- Wrote grant applications for workplace ESOL programs through conducting community need assessments and analyzing data.

Forest Foundation Fellow, Boston, MA June 2019–Aug. 2019
Summer 2019 Fellow

- Wrote and presented a grant application for Boston-based non-profit which received $4,000.

INTERESTS

- Downhill and Cross-County Skiing; Sea kayaking; Amateur Winemaking.

UNIVERSITY OF WASHINGTON
UNOFFICIAL ACADEMIC TRANSCRIPT

Prepared on 6/13/2023

Anna Elizabeth Ferron — Law LAW
1473106 — 09/11/XX
3RD YR PROF — CURRENTLY ENROLLED (SPRING QUARTER, 2023)

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 ************************************************
 * ANY ALTERATION OR MODIFICATION OF THIS RECORD  *
 * OR ANY COPY THEREOF MAY CONSTITUTE A FELONY    *
 * AND/OR LEAD TO STUDENT DISCIPLINARY SANCTIONS. *
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GPA CALCULATION BEGAN AUTUMN 2005 FOR LAW STUDENTS.

             AUTUMN 2014                N MATR  6
 SPAN   103  ELEMENTARY SPANISH         5.0   3.4
        QTR  ATTEMPTED:  5.0 EARNED:  5.0 GPA:  3.40
        QTR  GRADED AT:  5.0     GRADE POINTS:  17.0
CUM ATTEMPTED:  5.0 UW EARNED:  5.0 TTL EARNED:  5.0
CUM GRADED AT:  5.0 GRADE PTS:  17.0  CUM GPA:  3.40

             AUTUMN 2021                LAW    11
 LAW A  502  CIVIL PROCEDURE I          6.0   A
 LAW A  504  TORTS                      7.0   A-
 LAW A  506  LEGAL ANALYSIS             3.0   A-
        QTR  ATTEMPTED: 16.0 EARNED: 16.0 GPA:  3.81
        QTR  GRADED AT: 16.0     GRADE POINTS:  61.0
CUM ATTEMPTED: 16.0 UW EARNED: 16.0 TTL EARNED: 16.0
CUM GRADED AT: 16.0 GRADE PTS:  61.0  CUM GPA:  3.81

 Global Public Health Emergency Impacted Enrollment
 - See Transcript legend

             WINTER 2022                LAW    11
 LAW A  500  LAW PERSPECTIVES           1.0   CR
 LAW A  501  CONTRACTS                  7.0   A
 LAW A  503  PROPERTY I                 6.0   A
 LAW A  506  LEGAL ANALYSIS             2.0   A-
        QTR  ATTEMPTED: 16.0 EARNED: 16.0 GPA:  3.96
        QTR  GRADED AT: 15.0     GRADE POINTS:  59.4
CUM ATTEMPTED: 32.0 UW EARNED: 32.0 TTL EARNED: 32.0
CUM GRADED AT: 31.0 GRADE PTS: 120.4  CUM GPA:  3.88

 Global Public Health Emergency Impacted Enrollment
 - See Transcript legend

             SPRING 2022                LAW    11
 LAW A  505  CRIMINAL LAW               5.0   A
 LAW A  506  LEGAL ANALYSIS             2.0   B+
 LAW A  507  CON LAW I                  6.0   A-
 LAW A  508  TRANSNATIONAL LAW          3.0   A-
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        QTR  GRADED AT: 16.0     GRADE POINTS:  60.1
CUM ATTEMPTED: 48.0 UW EARNED: 48.0 TTL EARNED: 48.0
CUM GRADED AT: 47.0 GRADE PTS: 180.5  CUM GPA:  3.84

 Global Public Health Emergency Impacted Enrollment
 - See Transcript legend

             AUTUMN 2022                LAW    12
 LAW B  503  EVIDENCE                   6.0   A
 LAW B  515  CRIM PRO: INVESTGTN        5.0   A-
 LAW B  597  JOURNAL SEMINAR            1.0   A
 LAW E  529  TRIBAL COURT CLINIC        4.0   CR
        QTR  ATTEMPTED: 16.0 EARNED: 16.0 GPA:  3.88
        QTR  GRADED AT: 12.0     GRADE POINTS:  46.5
CUM ATTEMPTED: 64.0 UW EARNED: 64.0 TTL EARNED: 64.0
CUM GRADED AT: 59.0 GRADE PTS: 227.0  CUM GPA:  3.85

 Global Public Health Emergency Impacted Enrollment
 - See Transcript legend

             WINTER 2023                LAW    12
 LAW A  509  ADMINISTRATIVE LAW         4.0   A-
 LAW B  507  FED COURTS & SYSTEM        4.0   A
 LAW B  597  JOURNAL SEMINAR            1.0   A
 LAW E  500  INDPT ADV WRITING          2.0   A
 LAW E  529  TRIBAL COURT CLINIC        4.0   CR
        QTR  ATTEMPTED: 15.0 EARNED: 15.0 GPA:  3.89
        QTR  GRADED AT: 11.0     GRADE POINTS:  42.8
CUM ATTEMPTED: 79.0 UW EARNED: 79.0 TTL EARNED: 79.0
CUM GRADED AT: 70.0 GRADE PTS: 269.8  CUM GPA:  3.85

             SPRING 2023                LAW    12
 LAW B  500  CIVIL PROCEDURE II         3.0   B+
 LAW E  525  POVERTY LAW                3.0   A-
 LAW E  529  TRIBAL COURT CLINIC        4.0   CR
 LAW E  550  COMPLEX LITIGATION         3.0   A
        QTR  ATTEMPTED: 13.0 EARNED: 13.0 GPA:  3.70
        QTR  GRADED AT:  9.0     GRADE POINTS:  33.3
CUM ATTEMPTED: 92.0 UW EARNED: 92.0 TTL EARNED: 92.0
CUM GRADED AT: 79.0 GRADE PTS: 303.1  CUM GPA:  3.84

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CUMULATIVE CREDIT SUMMARY:
 UW CREDITS ATTEMPTED  92.0  UW CREDITS EARNED  92.0
 UW GRADED ATTEMPTED   79.0  EXTENSION CREDITS   0.0
 UW GRADED EARNED      79.0  TRANSFER CREDITS    0.0
 UW GRADE POINTS      303.1  ---------------------
 UW GRADE POINT AVG.   3.84  CREDITS EARNED     92.0
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***************** WORK IN PROGRESS *****************
             AUTUMN 2023                LAW    13
 LAW A  515  BUSINESS ORGNZATION        4.0
 LAW A  565  AMERICAN INDIAN LAW        4.0
 LAW B  510  PROBS PROF RESPONS         4.0
        QTR  REGISTERED:               12.0
****************** END OF RECORD *******************
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BOSTON COLLEGE

Office of Student Services
Academic Transcript

Boston College
Office of Student Services
Lyons Hall 103
140 Commonwealth Avenue
Chestnut Hill, MA 02467

NAME: ANNA ELIZABETH FERRON
SCHOOL: MORRISSEY COLLEGE OF ARTS AND SCIENCES
DEGREE: BACHELOR OF ARTS 05/18/2020
MAJOR: ECONOMICS
MINORS: SOCIAL IMPACT & PUBLIC GOOD, THEOLOGY

STUDENT ID#: 46333787
DATE PRINTED: 06/08/2023
PAGE: 1 OF 1

ADVANCED PLACEMENT

HIST1071	HISTORY CORE I EQUIV		
HIST1075	HISTORY CORE II EQUIV		
MATH1011	MATH CALCULUS CORE EQUI		
POLI1001	POLITICAL SCI CORE EQUIV		

FALL 2016 ARTS & SCIENCES

ECON1131	PRINCIPLES/ECON I/MICRO	03	A-
ENGL1080	LITERATURE CORE	03	A-
EESC1157	OCEANOGRAPHY	04	B+
POLI1041	FUND/CONCEPTS OF POLITICS	03	B
SPAN1117	INTERMED SPAN PRACTICUM I	01	A-
SPAN1115	INTERMEDIATE SPANISH I	03	B-

EARNED CREDITS: 17 GPA: 3.295

SPRING 2017 ARTS & SCIENCES

ECON1132	PRINCIPLES/ECON II/MACRO	03	B-
ECON1151	STATISTICS	04	B+
ENGL1010	FIRST YEAR WRITING SEM	03	B+
ENVS2256	ENVIRONMENTAL LAW&POLICY	03	A-
SPAN1116	INTERMEDIATE SPANISH II	03	B-

EARNED CREDITS: 16 GPA: 3.146

FALL 2017 ARTS & SCIENCES

AADS3310	RACE,LAW&RESISTANCE	03	A-
THTR1170	INTRODUCTION TO THEATRE	03	A-
ECON2201	MICROECONOMIC THEORY	03	B+
PHIL1070	PHILOSOPHY OF PERSON I	03	B
THEO1023	EXPLORING CATHOLICISM I	03	A

EARNED CREDITS: 15 GPA: 3.534

SPRING 2018 ARTS & SCIENCES

ECON2202	MACROECONOMIC THEORY	03	B+
ECON3315	ECONOMICS OF IMMIGRATION	03	A
EESC1187	GEOSCIENCE&PUBLIC POLICY	03	B
PHIL1071	PHILOSOPHY OF PERSON II	03	A-
THEO1024	EXPLORING CATHOLICISM II	03	A

EARNED CREDITS: 15 GPA: 3.600

----------END OF COLUMN----------

FALL 2018 ARTS & SCIENCES

ECON2228	ECONOMETRIC METHODS	04	A-
ECON3374	DEVELOPMENT ECON&POLICY	03	A-
ISYS3345	MANAGING FOR SOCIAL IMPAC	03	A-
BSLW1021	LAW I/INTRO TO LAW	03	A
THEO3202	IMMIGRATION AND ETHICS	03	A

EARNED CREDITS: 16 GPA: 3.794

SPRING 2019 ARTS & SCIENCES
NON-BC FOREIGN STUDY PROGRAM
AT: SALAMANCA UNIVERSITY

UXSA1025	SPANISH ART	01	A	TRANSFER CRED
UXSA1028	SPANISH/LATIN AMER CINEMA	02	B	TRANSFER CRED
UXSA1039	SPANISH HISTORY	01	A-	TRANSFER CRED
UXSA1056	ECONOMICS/POLI SCI IN EU	03	A	TRANSFER CRED
UXSA1062	INTERMEDIATE SPANISH	02	A	TRANSFER CRED
UXSA1062	ADVANCED SPANISH	03	A	TRANSFER CRED
UXSA1062	CONVERSATION/COMPOSITION	03	A	TRANSFER CRED
UXSA1070	SPANISH CULTURE	03	A	TRANSFER CRED

***** EXTERNAL STUDY

EARNED CREDITS: 18

FALL 2019 ARTS & SCIENCES

ECON2277	ENVIRON ECON AND POLICY	03	B+
ECON3363	MICRO PUB POLICY ISSUES	03	A
BSLW1147	CONSTITUTIONAL LAW	03	A
BSLW1185	TOPICS:LAW&ECONOMICS	03	B+
THEO3557	CATHOLICISM&SOCIAL RESP	03	A

EARNED CREDITS: 15 GPA: 3.732

SPRING 2020 ARTS & SCIENCES

BSLW6001	LEADING FOR SOCIAL IMPACT	03	P
THEO2160	CHALLENGE OF JUSTICE	03	A
THEO1342	PEACEFL/ETHICL LDSHP METH	03	P
THEO2410	CAPSTONE:ONE LIFE/MANY	03	A

EARNED CREDITS: 12 GPA: 4.000

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TOTAL EARNED CREDITS: 124 GPA: 3.541

----------END OF RECORD----------

ISSUED TO : ANNA ELIZABETH FERRON
9108 SE 72nd Pl
Mercer Island WA 98040

Bryan D. Jones
University Registrar

The University of Washington School of Law
William H. Gates Hall
Box 353020
Seattle, Washington 98195
206-543-4551
http://www.law.washington.edu/

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am a Professor of Law at the University of Washington School of Law in Seattle, and I am delighted to write this letter of recommendation in support of Anna Ferron's application for a judicial clerkship. Ms. Ferron is an excellent student who has distinguished herself both in her studies and through her extracurricular activities during her time at the UW School of Law. She is one of the most thoughtful, self-reliant students I have had the pleasure of teaching and mentoring, and I am confident she will enjoy an easy transition to a successful legal practice. She is an exceptional judicial clerkship candidate, and I make this recommendation enthusiastically and without reservation.

Ms. Ferron was a student in my Evidence class last quarter, and she performed extraordinarily well in class discussions, on quizzes, and class assignments. She also performed at the highest level on the final examination, earning her a final grade of A, which is extremely difficult to attain given our strict grading curve. In fact, she placed third in a class consisting of an unusually high percentage of outstanding students. I say this because there was a notable increase last quarter in the caliber of student commitment to mastering the rules of evidence. When I asked the students about this anomaly, they said that the "word on the street" when students registered for this year's courses was that, while students would absolutely learn the rule of evidence in my course, it required a "ton of work." I asked them further why they signed up for my class, knowing it would require significant time and effort. Almost uniformly, the response was that they wanted to be superlative trial lawyers and to do that they knew they really needed learn evidence.

Ms. Ferron was a delight to have in class: she was always well-prepared, eager to master the concepts we studied, and performed at the highest level. She distinguished herself in class discussions, on quizzes, and in her written course work. Ms. Ferron has a natural ability to think quickly on her feet, and she deepened her understanding of the rules of evidence and trial practice over the course of the class. The class required students to work together on hypothetical problems, and Ms. Ferron worked most effectively with a wide range of personality types in performing this course work. For each class, Ms. Ferron demonstrated she had not only done the assigned reading but had engaged with it in a meaningful way. Her questions and comments often reflected critical thought about how to strategically employ both evidentiary rules and rhetoric. She challenged her classmates to dig deeper into the rules of evidence and the ramifications of different evidentiary rules on different classes of litigants. In particular, she was passionate in her critique of the evidence rules as written and applied when they produced inconsistent and unjust results. Her analytical skills were an asset to class discussion and would surely be an asset to you in chambers.

In addition to her course work, Ms. Ferron has been an engaged, active member of the law school community. She serves on the editorial board of the Washington Law Review, where she has further honed her strong legal research and analysis skills. Her journal work also further establishes her track record of raising and debating issues of justice with her colleagues. Her commitment to her clients in the UW Tribal Public Defense Clinic has also motivated her to continue to hone her trial advocacy skills, which are already impressive. For example, in addition to her many activities, Ms. Ferron was a semi-finalist in the 1L Mock Trial Competition last year, where she advocated brilliantly thorough her strategic thinking, creative problem-solving and exceptional presentation skills. It is notable that this active involvement in law school activities and Tribal Court work is most time-consuming and was all undertaken while earning grades in her course work that place her at the top of her class.

In light of Ms. Ferron's academic accomplishments, school activities, and work experience, I believe she is a strong candidate for a judicial clerkship. She has proven herself to be bright, motivated, creative, reliable, and mature, with natural people-skills that will serve her well in her future endeavors. She is personable and easy-going, with an air of confidence and unflappability. I am confident she is someone with whom you, your staff and clerks would enjoy working, and that you will be pleased with her work product and performance.

For these reasons, I believe Ms. Ferron to be an exceptional judicial clerkship candidate. If I can be of any further assistance, please contact me at mahoward@uw.edu or by telephone at (206) 616-6236. I would be happy to talk with you at length about this truly exceptional student.

Sincerely,

Maureen A. Howard
Professor of Law
University of Washington School of Law
(206) 616-6236 | mahoward@uw.edu

Maureen A. Howard - mahoward@uw.edu - 616-6236

The University of Washington School of Law
William H. Gates Hall
Box 353020
Seattle, Washington 98195
206-543-4551
http://www.law.washington.edu/

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I write to highly recommend Anna Ferron for a clerkship in your chambers. Anna offers a compelling combination of academic excellence, proven compassionate commitment to persons in greatest need, and civil and criminal legal experience. Her drive for excellence, direct services experience with persons struggling economically, and calm strong professionalism will make her a great asset in chambers.

This recommendation is based on witnessing Anna excel for two years, since Anna's first year in law school. During this time, I have greatly appreciated Anna's excellent judgment, compassionate insights on important issues, and her legal research, writing, and oral advocacy talents. Currently, I am supervising Anna's potential Washington Law Review comment on the Excessive Fines clauses of the U.S. and Washington state constitutions as bases to challenge laws and policies that impact unhoused persons.

A stellar aspect of Anna's work is her persistent consistent dedication to elevating persons facing economic adversity. Anna's oral and written advocacy are not mere abstract exercises in flexing knowledge. Rather, she writes with a deep humanism and attention to the persons and stories behind the legal issues. She writes with moving authority and attention to human impact shaped by her work with migrants and persons facing homelessness or other economic adversity. Through the English for New Bostonians program and her work with the Jesuit Volunteer Corps, Anna gained experience helping connect people in need to services to social services and English learning opportunities.

After graduating from Boston College and joining the University of Washington School of Law, Anna continued her important work aiding people in crisis while successfully achieving academic successes. She worked under the auspices of the Northwest Justice Project with people facing consumer debt and housing issues. She also is a member of the Tulalip Bar, representing clients in Tribal Court. This summer, Anna will be complementing her outstanding criminal law and procedure skills and experience with civil-size work on class actions, consumer protection, and civil suits.

Through two large classes, Anna has shined because of the depth of her insights, her preparedness, and her professionalism. You can count on Anna to bring her best even in hectic times, and to add fresh insights based on experience working with people most impacted by the law. She is principled, dedicated, and open-minded, and she has the compassion and vision to see the persons behind the masks of the law. In her compassion and attention to the narratives of people impacted, she reminds me of the great Ninth Circuit Judge John T. Noonan, Jr., for whom I had the honor of clerking.

In person, you will find Anna to be a thoughtful conscientious member of the team and superb listener who deeply synthesizes the contributions of the group. I hope you have the opportunity to meet and work with Anna. I think you will be proud to count her among your trusted law clerks.

If you have any questions, I am delighted to further discuss Anna's compelling candidacy. Thank you for your consideration.

Sincerely,

Mary D. Fan
University of Washington School of Law
William H. Gates Hall | Box 353020 | Seattle, WA 98195-3020
(206) 685-4971 | mdfan@uw.edu

WRITING SAMPLE

The attached writing sample is an excerpt from the draft of my Law Review Note. For my Note, I analyze the Federal and Washington State Excessive Fines Clause as it relates to *City of Seattle v. Long* from the Washington Supreme Court.

This version of this Note has been reviewed by a member of the UW Law faculty and law review staff, but the writing is my own. I have included the Abstract, Part II which outlines the jurisprudence surrounding the Excessive Fines Clause and Part IV which argues that a proper reading of the Long decision would broadly apply the Excessive Fines Clause in a way that is protective of unhoused people, and the Conclusion. I omitted Part I and Part III. In Part I, I provided background on the housing crisis in Washington and laws that adversely affect unhoused people. In Part III, I outlined the facts and holding of *City of Seattle v. Long.*

The full Note has been selected for publishing in Washington Law Review and an edited version will be available in October of 2023.

Abstract: Over the last decade, Washington State has seen a substantial increase in its unhoused population and an increase in laws that harm this group. Many of these laws subject unhoused people to fines, fees, and forfeitures that are exceedingly difficult for them to afford. The Excessive Fines Clauses of the United States and Washington Constitutions aim to protect citizens from fines deemed constitutionally excessive. In *City of Seattle v. Long*, the Supreme Court of Washington analyzed a person's ability to pay when deciding whether a fine violated the Excessive Fines Clauses. This Note contends that the *Long* decision offers a strong constitutional foundation for arguments against the enforcement of many laws and policies that adversely affect unhoused persons. Part I reviews the current state of the housing crisis in Washington, and the legal ramifications unhoused people are facing. Part II discusses the historical jurisprudence of the Washington State and the Federal Excessive Fines Clauses, and their relation to the question of a person's ability to pay. It then outlines the *Long* case and how it fits into the framework of the Excessive Fines Clause. Finally, Part III argues that an expansive read of the *Long* decision is both constitutionally appropriate, in light of current jurisprudence, and an important tool for advocating for unhoused people.

I. THE EXCESSIVE FINES CLAUSE AND *CITY OF SEATTLE V. LONG*

The Excessive Fines Clause of both the U.S. and Washington Constitution aim to protect citizens from fines that are deemed constitutionally "excessive."[1] Until recently, these clauses have not received much attention or litigation, as compared to other sections of the Constitution.

Section II.A of this Part explains the Excessive Fines Clause, its history, and the current jurisprudence regarding the Clause. It then discusses the question of ability to pay and whether it has a role in an Excessive Fines Clause Analysis. Section II.B discusses the Supreme Court of Washington case of *City of Seattle v. Long*, how the Court analyzed the Excessive Fines Clause, and its findings regarding the importance of ability to pay.

A. The Excessive Fines Clause, its History, and its Application

1. Historical Roots of the Clause

In applying the Excessive Fines Clause, courts are heavily impacted by the historical roots of the clause.[2] The modern Excessive Fines Clause is rooted in the Magna Carta.[3] The Magna Carta, written in 1215, stated that people should only be fined "in proportion to the degree of [their] offense…. But not so heavily as to deprive him of his livelihood."[4] The concept of proportionality continued in colonial era provisions, such as the Frame of Government of Pennsylvania requirement that fine's shall be "moderate and saving men's contentment, merchandise, or wainage."[5] The language of the U.S. Constitution's Eighth Amendment is directly based on a provision of the Virginia Declaration of Rights of 1776, which echoed a further provision from the English Bill of Rights of 1689.[6] The implementation of the Excessive Fines Clause was, at the time, understood to be linked to the "analogous legal protection in English

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[1] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted"); WASH. CONST. art I. § 14 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").
[2] *E.g.,* Timbs v. Indiana, 139 S. Ct. 682 (2019).
[3] The Magna Carta refers to amercements, as opposed to fines. An amercement is similar to the modern understanding of a fine but was a "non-optional pecuniary penalty imposed by the king." Nathaniel Amann, *Restitution and the Excessive Fines Clause*, AMERICAN CRIMINAL LAW REVIEW, 206, 213; The Magna Carta of John 1 (1215), 20 Joh. 1. https://www.bl.uk/learning/timeline/item95692.html.
[4] The Magna Carta of John 1 (1215), 20 Joh. 1. https://www.bl.uk/learning/timeline/item95692.html.
[5] Frame of Government of Pennsylvania. May 5,1682, paragraph XVIII.
[6] *See* Allan Nevins, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789, 146 (1924).

history."[7] Upon the passing of the Eighth Amendment, the Excessive Fines Clause received minimal attention. There was no debate at the Constitutional Convention over the Excessive Fines Clause, except from one representative of South Carolina who questioned whether the Clause has any meaning at all.[8] Thus, instead of looking to the history of the Constitutional Convention—as courts often do when reading the Constitution—courts interpreting the Excessive Fines Clause look to its historical roots. This history is foundational to courts' future interpretation and analysis of the clause. Despite its long historical roots, the Supreme Court did not hear an Excessive Fines Claim until 1989 in the case of *Browning-Ferris Industries v. Kelco Disposal, Inc.*[9] There, plaintiffs challenged a six-million-dollar jury damages award under the Excessive Fines Clause.[10] The Court, relying on the history of the Excessive Fines Clause, held that the Excessive Fines Clause did not apply to a punitive jury award in a civil trial.[11] The Court in *Browning-Ferris* did not create a test for whether a fine is constitutionally excessive.[12]

2. The Partially Punitive Requirement

There are several key considerations courts look to when analyzing an Excessive Fines Clause claim, starting with whether the fine has a punitive purpose or serves to punish.[13] In order to be assessed under the Excessive Fines Clause, the fine must only be partially punitive.[14] If the court sees the fine as only having a remedial purpose, the Clause will not apply. The fine does not, however, need to only serve a punitive purpose in order to undergo an Excessive Fines analysis, as is discussed below. In *Austin v. United States*[15], the Supreme Court considered a civil forfeiture a fine because the forfeiture of a mobile home and auto body shop was considered to be punitive.[16] Austin pled guilty to one count of possession with an intent to distribute.[17] He was sentenced to seven years in prison and the United States initiated a civil forfeiture of both his mobile home and his body shop which were worth about $37,000.[18] Austin argued that this was a violation of the Excessive Fine Clause but the Eighth Circuit held that the Eighth Amendment did not apply to the civil forfeiture.[19] The Supreme Court held that the civil forfeiture was punitive and thus, required an Eighth Amendment Excessive Fines analysis.[20] The Court stated the "question is not… whether the forfeiture… is civil or criminal, but rather whether it is punishment."[21] Punishment does not have to be the only purpose of the fine, however.[22] The Court held that "serving in part to punish" is enough for the Excessive Fines Clause to apply and remanded the case on the issue of whether this fine was constitutionally excessive.[23] After *Austin*, this precondition became known as the

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[7] Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 840. (2013).
[8] Nathaniel Amann, *Restitution and the Excessive Fines Clause*, AMERICAN CRIMINAL LAW REVIEW, 206, 216.
[9] Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
[10] *Id.*
[11] Nathaniel Amann, *Restitution and the Excessive Fines Clause*, AMERICAN CRIMINAL LAW REVIEW, 206, 208.
[12] *Id.* at 213; *Browning-Ferris*, 492 U.S. at 257..
[13] *Punitive*, BLACK'S LAW DICTIONARY (9th ed. 2009).
[14] Austin v. United States, 509 U.S. 602 (1993).
[15] *Id.*
[16] *Id.* at 610.
[17] David Lieber, Eighth Amendment--The Excessive Fines Clause, 84 J. CRIM. L. & CRIMINOLOGY 805, 811-12 (Winter 1994).
[18] *Id.* at 812.
[19] The Eighth Circuit expressed some hesitation at the idea that there should be no constitutional review of this type of seizures and stated they were "troubled" with the idea that any property could be seized only because the owner committed a single drug offense. *Id.* at 813. quoting United States v. 508 Depot Street, 964 F.2d 814, 816 (8th Cir. 1992)).
[20] Austin v. United States, 509 U.S. 602, 610 (1993).
[21] *Id.*
[22] *Id.*
[23] *Id.*; Lieber, *supra* note 17 at 814-15.

"partially punitive" requirement.[24] This requirement is foundational for the application of the Excessive Fines Clause.

3. The Proportionality Analysis

Once a fine has been deemed partially punitive, courts use a proportionality test to determine if a fine is constitutionally excessive. In 1998, the Supreme Court finally took up the question of when a fine is constitutionally excessive. [25] In *Bajakajian*[26], an individual was charged with failing to report that he was bringing over $10,000 outside the United States, as required by federal statute.[27] As punishment for his failure to report, the individual was required to forfeit the entire $357,144 he tried to transport.[28] Under *Bajakajian*, a fine is grossly disproportional to its offense, then it violates the Excessive Fines clause.[29] . Proportionality is "[t]he touchstone of the constitutional inquiry . . . the amount of the forfeiture must bear some relationship to the gravity of the offense that is designed to punish."[30] When analyzing proportionality, the *Bajakajian* court considered four factors:

> '(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused'[31]

The Court did not indicate that these factors were exhaustive but used them to find that the high fine imposed on Bajakajian was not proportional to the offense of failure to report.[32] Since *Bajakajian* courts have generally been guided by these factors, but one open question is whether ability to pay should be a part of this analysis.[33]

4. The Question of Ability to Pay

The Supreme Court has not decided whether ability to pay should be an additional factor in the proportionality analysis performed under the Excessive Fines Clause. The historical roots of the Excessive Fines Clause in the Magna Carta and colonial laws may lead to the conclusion that ability to pay should be a factor. [34] The Court has noted that these roots resonate with the idea that a fine is excessive if it impedes on one's livelihood.[35] But, the Court has not yet decided on whether ability to pay should factor into the analysis stating that the *Bajakajian* Court took "no position… on whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine."[36] The issue of ability to pay, however, was not presented by *Bajakajian*, and thus, the Court did not consider it when makings its holding.[37] The only mention of "ability to pay" in Bajakajian appears in a footnote:

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[24] *See e.g.,* Amann, *supra* note 8, at 211.
[25] United States v. Bajakajian, 524 U.S. 321 (1998).
[26] *Id.*
[27] *Id.*; 31 U.S.C § 5316(a)(1)(A).
[28] *Bajakajian*, 524 U.S., at 337.
[29] *Id.* at 336.
[30] *Id*. at 334.
[31] United States v. 100,348.00 in United States Currency, 354 F.3d 1110, 1121 (9th Cir. 2004) (citing United States v. Bajakajian, 524 U.S. 321, 337-340 (1998)).
[32] *Bajakajian*, 524 U.S., at 334.
[33] *E.g.,* State v. Grocery Mfrs. Ass'n. 195 Wash.2d 442, 476, 461 P.3d 334 (2020) (citing to the Bajakajian factors).
[34] E.g., Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).
[35] *Id.*
[36] *Id.*
[37] *Bajakajian*, 524 U.S., at 340

"respondent does not argue that his wealth or income are relevant to the proportionality determination."[38] There has been no clear decision on the matter, leading to unclear Supreme Court precedent on the issue of ability to pay.

Since the United States Supreme Court has not yet ruled on ability to pay, jurisdictions outside Washington have differed on whether the proportionality test includes an analysis of a person's ability to pay. Although these decisions are not binding in Washington state, they may have persuasive value in Washington.[39] Many courts across the country have examined ability to pay in their proportionality analysis.[40] The Supreme Court of Colorado recently held that ability to pay should be central to a proportionality analysis.[41] In *Colorado Department of Labor v. Dami Hospitality*[42], the Supreme Court of Colorado expanded its Excessive Fines analysis to include ability to pay. In *Dami*, a hospital was fined $841,200 based on 1,689 daily fines for failure to comply with statutes requiring them to retain workers' compensation insurance.[43] The Supreme Court of Colorado noted that the Supreme Court's citations to the Excessive Fine's Clauses' historical predecessors and its consideration of an ability to pay analysis as "persuasive evidence that a fine that is more than a person can pay may be 'excessive'".[44] Further, the court reasoned that ability to pay is appropriate as a fine that "would bankrupt a person or put a company out of business would be substantially more onerous fine than one that did not."[45]

Other courts have declined to weigh ability to pay in the Excessive Fines balancing test. In *United States v. 817 N.E. 29th Drive*[46], the Eleventh Circuit pointed to the Supreme Court's analysis in Bajakajian and noted that there was no comparison of the amount of the forfeiture to the owner's assets, but to the gravity of the offense itself.[47] The Ninth Circuit also declined to examine ability to pay in the context of the Mandatory Restitution to Victim's Act, holding that the Eight Amendment gross disproportionality test does not require any inquiry into the offender's ability to pay.[48]

Until the *Long* decision, Washington Courts had not yet ruled on whether a person's ability to pay should be a part of the Excessive Fines analysis within the state. Part II.B includes a discussion of the Supreme Court of Washington's decision on ability to pay.[49]

5. The Excessive Fine Clause and Washington State

The Federal Excessive Fines Clause was not applied to the states until 2019.[50] In *Timbs v. Indiana*[51], Indiana sought a civil forfeiture of petitioner's car, saying that it had been used to transport heroin.[52] The trial court in Indiana found the civil forfeiture to be grossly disproportionate to Timb's drug

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[38] *Id.* at 340 n.15.
[39] Kate Mayer, "Which Court is Binding" GEORGETOWN UNIVERSITY LAW CENTER, (2017). https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf
[40] *E.g.,* U.S. v. Levesque, 546 F.3d 78 (1st Cir. 2008); State v. Goodenow, 282 P.3d 8, 17 (Or. App. 2012); State v. Taylor, 70 S.W.3d 717, 723 (Tenn. 2002).
[41] Colo. Dep't of Labor & Emp't. Div. of Worker's Comp. v. Dami Hosp., LLC, 2019 CO 47, 442 P.2d 94.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999).
[47] *Id.*.
[48] United States v. Dubose 146 F.3d 1141, 1146 (9th Cir. 1998) (holding that the Mandatory Restitution to Victim's Act did not violate the Excessive Fines Clause as applied or facially).
[49] Infra section. II.B.2.
[50] *See* Timbs v. Indiana, 139 S. Ct. 682 (2019).
[51] Timbs v. Indiana, 139 S. Ct. 682 (2019).
[52] Civil asset forfeiture is the seizing of property that the government believes is connected to a crime. The proceedings are civil in nature and do not require any formal criminal proceedings. Karen Dolan, Jodi L. Carr, THE

conviction, as he purchased his car for almost four times as much as the maximum monetary fine for his offense.[53] The Supreme Court of Indiana held that the Federal Excessive Fines Clause only applied to federal actions, not state impositions.[54] The U.S. Supreme Court granted cert on the question of incorporation of the Eighth Amendment. Incorporation is when the Supreme Court applies Federal Constitutional provisions to the states.[55] The Court noted that the safeguard against excessive fines in the Eighth Amendment is "fundamental to our scheme of ordered liberty" and "deeply rooted in this nation's history and tradition" and thus, should be incorporated through the Fourteenth Amendment.[56] After *Timbs*, the Federal Excessive Fines applies to both Federal and State government action.

Beside the Federal Excessive Fines Clause, Washington also has separate Constitutional protections against Excessive Fines. Although the Federal Excessive Fines Clause was not incorporated against the states until 2019, all fifty states—including Washington—have constitutional provisions against excessive fines.[57] The Washington Constitution's Excessive Fines Clause directly mirrors the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[58] In Washington, there are some provisions of the State Constitution that directly mirror the Federal one but are interpreted as providing greater protections than their federal counterpart.[59] The Washington Excessive Fines Clause, however, has not yet been interpreted as providing any greater protections.[60] The Court, in *Long*, did not reject the possibility of this happening in the future, but stated that there was not adequate briefing to support a more protective analysis.[61] Thus, there is some room for potential advocacy in this realm.[62] Currently, however, Article I Section 14, and the Eighth Amendment are viewed in Washington as "coextensive for the purposes of excessive fines."[63] As the law currently stands, Washington Courts analyze the Washington Excessive Fines Clause in tandem with the Eighth Amendment's Clause. Thus, If the Federal Excessive Fines Clause is violated, so is the Washington one and vice versa.[64] For the purposes of this Note, the two Excessive Fines Clause can be seen as

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POOR GET PRISON 11 (2015). https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf; Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

[53] Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

[54] *Id.*

[55] E.g., *Id.*

[56] *Id.* at 689. (quoting McDonald v. Chicago 561 U.S. 742, 767).

[57] *Id.*

[58] WASH. CONST. art I. § 14.

[59] *E.g.,* State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) (interpreting Washington's Article I Section 7 protections regarding constitutionally protected searches as more protective than the Federal Constitution's fourth amendment).

[60] City of Seattle v. Long, 198 Wash. 2d 136, 143, 493 P.3d 94 (2021).

[61] *Id.*

[62] Lower courts in Washington have heard arguments on whether there is a basis for treating Washington's Excessive Fines Clause as more protective than the Federal Excessive Fines Clause and have not yet found any basis for applying a different standard under Washington law. E.g., State v. Tatum, 23 Wash. App. 2d 123, 133, 514 P.3d 763, 769 (2022) (finding no difference in the goals of the U.S. and Washington in this regard); State v. Ramos, 24 Wash. App. 2d 204, 223, 520 P.3d 65, 76 (2022) (finding no basis to interpret the clauses differently partially due to the text and origins being the same).

[63] Lower courts in Washington have heard arguments on whether there is a basis for treating Washington's Excessive Fines Clause as more protective than the Federal Excessive Fines Clause and have not yet found any basis for applying a different standard under Washington law. E.g., State v. Tatum, 23 Wash. App. 2d 123, 133, 514 P.3d 763, 769 (2022) (finding no difference in the goals of the U.S. and Washington in this regard); State v. Ramos, 24 Wash. App. 2d 204, 223, 520 P.3d 65, 76 (2022) (finding no basis to interpret the clauses differently partially due to the text and origins being the same).

[64] E.g., State v. Tatum, 23 Wash. App. 2d 123, 133, 514 P.3d 763, 769 (2022) (finding no difference in the goals of the U.S. and Washington in this regard); State v. Ramos, 24 Wash. App. 2d 204, 223, 520 P.3d 65, 76 (2022) (finding no basis to interpret the clauses differently partially due to the text and origins being the same).

coextensive, and the arguments made apply to both. Thus, the following analysis for Excessive Fines, as applied to the U.S. Constitution, would apply for both the U.S. and Washington Constitution.

PART IV: APPLYING THE *LONG* HOLDING MORE BROADLY

The Excessive Fines Clause acts as a safeguard for those fined by the government.[65] At its core, it aims to protect people from paying fines that are more harmful than the action that resulted in the fine.[66] In *City of Seattle v. Long,* the Supreme Court of Washington sought to meet that goal through analyzing Long's ability to pay when finding the fine to be excessive.[67] Taking this goal into account, this Note argues that a proper reading of *Long* would lead to an expansion of those protected by the Excessive Fines Clause and provides considerations for this expansion.

For the purposes of this analysis, the Washington and Federal Excessive Fines Clause are seen as coextensive, and these arguments apply to both.[68] Though this Note is tailored towards Washington and the ramifications of the holding in *Long*, these arguments could be expanded to any jurisdiction that decides to analyze ability to pay when ruling on Excessive Fines Clause issues.

A. Long and the Partially Punitive requirement

Many fine based ordinances that impact vehicle residents should be seen by the courts as partially punitive. In *Long,* temporary impoundment was seen as partially punitive because it served more than just a remedial purpose.[69] After *Long*, some fines will easily meet the partially punitive requirement, and others may be less clear.

1. Fines That Are as Punitive or More Punitive Than Long's Impoundment and Fees Should Be Categorized as Partially Punitive

Under a consistent application of *Long*, ordinances with the same or higher penalties than in *Long* should meet the partially punitive requirement. Temporary impoundment and associated fees, like the one in *Long*, have been held to be partially punitive.[70] Thus, other temporary impoundments and permanent impoundments will fall into the same category. Fines that are associated with criminal punishment will also meet the partially punitive requirement as they are more punitive in purpose than the fine in *Long*.[71] A criminal ordinance with attached fines shows that the nature of the ordinance is not for remedial purposes, but to punish those who violate the law. For example, the Mercer Island ordinance banning camping—which is punishable by imprisonment and/or a fine of up to $1000—should easily meet the

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[65] Supra section II.A.1.
[66] *Id.*
[67] *See* City of Seattle v. Long, 198 Wash. 2d 136, 176 493 P.3d 94, 115 (2021).
[68] In *Long*, the Court did not make a finding on whether the Washington Constitution's Excessive Fines Clause should be interpreted more broadly than its counterpart in the U.S. Constitution, as some other portions of the Washington Constitution that mirror the Federal Constitution are. City of Seattle v. Long, 198 Wash. 2d 136, 143, 493 P.3d 94 (2021). Lower courts in Washington have heard arguments on whether there is a basis for treating Washington's Excessive Fines Clause as more protective than the Federal Excessive Fines Clause and have not yet found any basis for applying a different standard under Washington law. E.g., State v. Tatum, 23 Wash. App. 2d 123, 133, 514 P.3d 763, 769 (2022) (finding no difference in the goals of the U.S. and Washington in this regard); State v. Ramos, 24 Wash. App. 2d 204, 223, 520 P.3d 65, 76 (2022) (finding no basis to interpret the clauses differently partially due to the text and origins being the same).
[69] City of Seattle v. Long, 198 Wash. 2d 136, 174 493 P.3d 94, 115 (2021).
[70] *Id.*
[71] MERCER ISLAND, WASH., MUNICIPAL CODE § 9.60.020(B) 9.60.030; MERCER ISLAND, WASH., MUNICIPAL CODE § 9.60.050 (noting that a camping violation is punishable by imprisonment of up to 90 days or a fine of up to $1000 as of 2021).

partially punitive requirement as the fine is attached to criminal punishment.[72] Although the question in *Austin* was not whether the fine came from a civil or criminal statute, the fines in criminal ordinances clearly serve more than a remedial purpose as the criminal penalties are indicative of an intent to punish.[73] Some portion of the fine could be argued to be remedial but fines that are associated with, or in place of, an option to put someone in jail should be assumed to be punitive.[74] This association with other punishment indicates the intent to punish those who inhabit their vehicles by assigning high fines or jail time, and not just to prevent people from sleeping in their cars for some remedial purpose, like safety or traffic control. Thus, these criminal ordinances will easily meet the partially punitive requirement under *Austin* and be subject to a gross disproportionality analysis.[75]

2. Courts Should Look to the Categorization and Nature of the Other Fines to Determine Whether They are Partially Punitive

Ordinances that have less harsh penalties than the ordinance in *Long* will require more attention from courts. In particular, this Note analyzes two relevant variables, after *Long*, for deciding whether a fine is partially punitive: the categorization of the ordinance and the nature of the fine.[76]

The categorization of a fine in an ordinance as a "penalty"—though not dispositive—should impact courts analysis of whether a fine is partially punitive. In *Long*, the Supreme Court of Washington looked to the plain language of the statute and assessed that the fine did not serve only a remedial purpose because it was categorized by the city as a "penalty."[77] Although this may lead courts to conclude that the title of "penalty" is the primary factor courts should use to identify whether something is partially punitive, this limited assessment will improperly characterize the Supreme Court of Washington's holding in *Long*.[78] Although the Court relied on the characterization and plain language of the ordinance, it was also highly deferential to the U.S. Supreme Court's earlier holding in *Austin* in this regard.[79] In situations, like the one in *Long*, where the city has named the ordinance in a way that explicitly shows that the purpose of the fine, the plain language analysis is proper.[80] If the name of the ordinance clearly shows its punitive nature, then the courts analysis could likely end there. When the ordinance does not explicitly use the word "penalty" or other language that indicates a punitive nature, courts should not see this as dispositive of the fact that there is no punitive purpose. In those situations, an expansive reading of *Long* may be more appropriate given the context. The partially punitive requirement, as originated in *Austin* and cited in *Long*, asks the question whether the fine serves in part to punish, not just whether the fine is referred to as a punishment.[81] If cities can evade the Excessive Fines Clause by simply changing the wording of their ordinances, then the underlying question in *Long* and *Austin* will not be answered properly and many fines that serve to punish will unfairly evade review.

B. Long and the Addition of Ability to Pay's Impact on the Gross Disproportionality Test

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[72] *Id.*
[73] *See* Austin v. United States, 509 U.S. 602, 610 (1993).
[74] MERCER ISLAND, WASH., MUNICIPAL CODE § 9.60.020(B) 9.60.030; MERCER ISLAND, WASH., MUNICIPAL CODE § 9.60.050.
[75] *See* Austin v. United States, 509 U.S. 602, 610 (1993); City of Seattle v. Long, 198 Wash. 2d 136, 164 493 P.3d 94, 109 (2021).
[76] City of Seattle v. Long, 198 Wash. 2d 136, 164 493 P.3d 94, 109 (2021).
[77] *Id*. *See also* SEATTLE, WASH., MUNICIPAL CODE § 11.72.440(E).
[78] City of Seattle v. Long, 198 Wash. 2d 136, 164 493 P.3d 94, 109 (2021).
[79] *Id.*
[80] *Id.*
[81] Austin v. United States, 509 U.S. 602, 610 (1993) (holding that "serving in part to punish" meets the requirements necessary for the Excessive Fines Clause to apply and thus, a civil forfeiture was considered a fine).

Once an ordinance has been deemed to be partially punitive, courts will have to perform the gross disproportionality analysis, including looking at ability to pay. For those with high levels on income, ability to pay will not have a high level of impact on whether a fine is deemed excessive. Ability to pay will be especially relevant, however, for those with little to no income. The *Long* case provides an example of what we know is clearly excessive and unconstitutional, but courts may need to use a case-by-case analysis in order to determine whether the application of other fines are constitutionally excessive.[82] The addition of ability to pay as a factor in the proportionality balancing test will increase the need for case-by-case analysis because ability to pay is specific to the individual who comes before the court. Despite requiring a case-by-case analysis, *Long* provides guidance for the courts as applied to vehicle residents and other unsheltered litigants.[83]

1. A General Finding of Unconstitutionality for Vehicle Residents?

The addition of ability to pay in the Excessive Fines analysis could lead to a finding that all fines imposed against vehicle residents are excessive and per se unconstitutional. Most vehicle residents live in their car for financial reasons, like Steven Long.[84] The Court in *Long* held that a finding of "little ability to pay" weighed in favor of gross disproportionality.[85] Even if vehicle residents have some level of income, their living circumstances are indicative of little ability to pay, assuming there are no other extenuating circumstances.[86] Importantly, the Court specifically noted the rise of the housing crisis in Washington as a factor leading them to include the ability to pay analysis.[87] This stance on homelessness and its connection to ability to pay should impact future courts' analysis of ability to pay, especially when being applied to unhoused people. Courts could reasonably find that there is no fine that is not excessive and unconstitutional as applied to vehicle residents.

The current realities for vehicle residents in Washington may suggest that, even considering the four other factors, all fines imposed on vehicle residents are unconstitutional.[88] Fines imposed on people unable to afford even temporary housing are always excessive as these fines lead vehicle residents to forego basic needs and perpetuate the cycle of poverty.[89] The historical roots of the Excessive Fines Clause in the Magna Carta, as referenced in *Long* and current Supreme Court jurisprudence, indicate that if a fine takes away someone's livelihood, it is constitutionally excessive.[90] Vehicle residents are often have little or no income or livelihood.[91] Thus, the imposition on fines on this group should be seen categorically excessive and unconstitutional.

2. Or a Strong Presumption Towards Disproportionality?

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[82] City of Seattle v. Long, 198 Wash. 2d 136, 164 493 P.3d 94, 109 (2021).
[83] *Id*.
[84] Recently, there has been a rise in people living a nomadic lifestyle in their vehicles, generally referred to as "van life." Often, these people work remotely or finance this lifestyle through savings. For purposes of this Note, "vehicle residents" refers to the members of the unhoused community who live in their cars, not those involved in van life. Callie Carmichael, Van life: Embracing minimalism, millennials ditch apartments in favor of nomadic lifestyle. USA TODAY (Oct. 24, 2019).
[85] City of Seattle v. Long, 198 Wash. 2d 136, 164 493 P.3d 94, 109 (2021)
[86] *See, e.g.,* Thacher Schmid, *Vehicle Residency: Homelessness We Struggle to Talk About*, THE NATION (November 11, 2021), https://www.thenation.com/article/society/homelessness-vehicle-residency-housing/.
[87] City of Seattle v. Long, 198 Wash. 2d 136, 171 493 P.3d 94, 113 (2021).
[88] *See* United States v. Bajakajian, 524 U.S. 321 (1998) ("(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused").
[89] Supra section I.D.
[90] Supra section II.A.1.
[91] Thacher Schmid, *Vehicle Residency: Homelessness We Struggle to Talk About*, THE NATION (November 11, 2021) https://www.thenation.com/article/society/homelessness-vehicle-residency-housing/.

If Washington courts do not find that these laws are categorically unconstitutional, the addition of the ability to pay analysis should generally lead towards a finding that fines imposed on vehicle residents are excessive, and thus, unconstitutional. For many of the same reasons as listed above, an ability to pay analysis as applied to vehicle residents should have a strong presumption of unconstitutionality.[92]

Courts could look at this strong presumption in a variety of ways. Courts could continue to use a case-by-case analysis and force unhoused or unsheltered litigants to prove that they have little ability to pay and that none of the other factors outweigh this one. Alternatively, courts could develop a burden shifting framework for analyzing these Excessive Fines claims, as brought by vehicle residents. The burden of proof could be shifted to the city or whatever entity imposed the fine. Cities would be required to show that a fine, as imposed on a vehicle resident, is not excessive and is constitutional. Cities may be able to show either i) this individual does have an ability to pay, or ii) their inability to pay is still outweighed by the other factors for a variety of reasons. Since cities have more resources and easier access to lawyers, this burden shifting may lead to more equitable results. Regardless of the approach taken, a presumption towards disproportionality should exist for partially punitive fines, as applied to vehicle residents.

C. The Long Holding Applies to Unsheltered People Beyond Vehicle Residents

The Excessive Fines Clause's application to vehicle residents can easily be expanded to fines imposed on unsheltered people in general. Vehicle residents are a subgroup of the unsheltered population.[93] Other members of this group include people who live on the street or in tent encampments.[94] There is nothing about the *Long* holding or about Long himself that indicates that the holding would not apply to the subgroup as a whole.[95] In fact, other unsheltered people may be even more likely to benefit from the addition of ability to pay in the Excessive Fines analysis.

1. Partially Punitive Laws and the Unsheltered

Laws that impact unsheltered people in general often should also meet the partially punitive requirement. Indeed, these laws may be even more likely to be seen as partially punitive because laws impacting vehicle residents may be seen to serve remedial purposes outside of the vehicle resident context, such as parking enforcement or traffic concerns.[96] Although these laws may have an adverse impact on vehicle residents, they may not have been intended to have a punitive effect. Laws passed to purposely drive out unhoused people or keep them in other cities, however, do not have the benefit of this assumption. Lawmakers, like those in Edmonds, WA, have even admitted that they have passed anti-camping and other ordinances in order to keep unsheltered people out of their community.[97] Similarly, laws that ban aggressive panhandling or public urination have a disproportional effect on unsheltered

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[92] Supra section III.B.ii.

[93] KING COUNTY REGIONAL HOUSING AUTHORITY, 2022 Point In Time Count (2022) https://kcrha.org/wp-content/uploads/2022/06/PIT-2022-Infograph-v7.pdf. *See also* ALL HOME, Count Us In: Seattle/King Country Point-in-Time Count of Individuals Experiencing Homelessness (2020) https://kcrha.org/wp-content/uploads/2022/05/Count-Us-In-2020-Final_7.29.2020-1.pdf.

[94] KING COUNTY REGIONAL HOUSING AUTHORITY, 2022 Point In Time Count (2022) https://kcrha.org/wp-content/uploads/2022/06/PIT-2022-Infograph-v7.pdf. *See also* ALL HOME, Count Us In: Seattle/King Country Point-in-Time Count of Individuals Experiencing Homelessness (2020) https://kcrha.org/wp-content/uploads/2022/05/Count-Us-In-2020-Final_7.29.2020-1.pdf.

[95] City of Seattle v. Long, 198 Wash. 2d 136, 164 493 P.3d 94, 109 (2021).

[96] E.g., SEATTLE, WASH., MUNICIPAL CODE § 11.72.440; ELLENSBURG, WASH., MUNICIPAL CODE § 8.12.020.

[97] Kim, Greg, Edmonds passes law criminalizing camping in public spaces – but lacks local homeless shelters, SEATTLE TIMES (May 26, 2022, 6:00 AM) https://www.seattletimes.com/seattle-news/homeless/edmonds-passes-law-criminalizing-homelessness-in-public-spaces-but-lacks-local-shelter-options/.

people.[98] These laws, as enforced against those without a place to live, are intended to be at least partially punitive. Categorically, many of these laws are passed with a punitive purpose and should be seen as such.

2. Ability to Pay and the Unsheltered

The addition of an ability to pay analysis could also be extended to the unsheltered in general. Unsheltered litigants generally have little ability to pay.[99] The cycle of poverty and its influence on all unsheltered people will be analogous to that of vehicle residents.[100] Thus, there is no reason that courts should limit the holding of *Long* to vehicle residents. Instead, Washington courts should follow the rationale of *Long* and recognize the right of unsheltered people to be free from excessive fines. Because vehicle residents are just a subgroup of the larger unhoused population, and there are no notable differences that would impact ability to pay, the holding should be extended to apply to unhoused people. Thus, Washington courts should either adopt the categorically unconstitutional approach or the strong presumption towards disproportionality approach, regarding the Excessive Fines Clause, for the entire unsheltered population.[101]

CONCLUSION

Washington's end goal should be to create safe, stable living environments for unsheltered people and eventually to find ways to move them out of homelessness. Instead, cities around Washington continue to pass laws that impose fines on people who are already homeless. These laws only increase the likelihood that those are fined remain unhoused. This Note contends that the Supreme Court of Washington case of *City of Seattle v. Long* and its expansive and individualized view of the Excessive Fines Clause offers a path forward for those advocating for the unhoused and their Constitutional rights.

The Excessive Fines Clause offers one way for advocates to protect the unhoused, but it cannot be the permanent solution. Once it is clear to municipalities and courts that these laws are unconstitutional, as applied to many unhoused people, they will cease to be a tool for adversely affecting the unhoused. Instead of inviting litigation expenses for unenforceable fines, cities should focus on working towards temporary and permanent solutions for vehicle residents and the unsheltered. This approach will ultimately lead to increased stability and benefit whole communities within Washington. The Excessive Fines Clause and an analysis of ability to pay, however, provides a promising strategy for working for and with unhoused people.

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[98] Supra section I.B.
[99] DEP'T OF COMMERCE. Why Is Homelessness Increasing (Jan. 2017). http://www.commerce.wa.gov/wp-content/uploads/2017/01/hau-why-homelessness-increase-2017.pdf.
[100] Supra section I.D.
[101] Supra section III.B.1; Supra section III.B.2.

WRITING SAMPLE II

The attached writing sample was written for my Complex Litigation Seminar. For my assignment, I analyzed the case of *Coughlin v. LAC Du Flambeau Band* that will be decided by the Supreme Court in the 2023 term. I analyzed the implications of a decision for either side for Federal Indian Tribes and Federal Indian Law, as well as for Bankruptcy cases.

Congressional Silence or Unequivocal Abrogation?
The Bankruptcy Code and Tribal Sovereign Immunity

Federally recognized Indian tribes hold a unique place in both modern society and the modern legal framework. Many of the narrative surrounding Indian tribes are rooted in historic assumptions and do not track with the modern-day reality.[1] Often, the tribes act in ways that are like cities, states, corporations, or communities. Over the past decades, many federally recognized Indian tribes in America have greatly progressed into major administrative states and entrepreneurial entities.[2] Many tribes own and operate business such as casinos[3], golf courses[4], and hotels[5]. Beyond these businesses that are often associated with tribal entities, tribes also own economic entities such as banks[6] and credit agencies.[7]

One such tension can be seen in Bankruptcy. The Bankruptcy Code (The Code) creates a complicated legal framework that is administered by the bankruptcy courts.[8] The Code support individual debtors, municipalities, businesses, and many other entities.[9] It is also devoid of any reference to Indian Tribes.[10] This poses a variety of issues for Indian Tribes as both debtors and creditors.[11] In 2023, the United States Supreme Court has taken up one of these issues.[12] Namely, whether the Bankruptcy Code, despite not explicitly mentioning Indian Tribes, abrogates tribal sovereign immunity or tribes right to not be sued.[13]

While the bankruptcy implications of this decision may be confusing, historical precedent and the importance of tribal sovereignty should weigh in favor of a determination for the Tribes. Given Congress's abrogation of tribal sovereign immunity in other contexts, Congress should be assumed to have "unequivocal" intent to abrogate tribal sovereign immunity without express intent through text or otherwise.

In Part I, this Article briefly overviews tribal sovereignty and the foundations of tribal and jurisprudence around tribal sovereign immunity. In Part II, it discusses the Bankruptcy Code and its relation to the tribes and tribal sovereign immunity. Part III outlines the circuit split over

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[1] *See* R. Spencer Clift II., The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes under the Bankruptcy Code and Related Matters, 27 Am. Indian L. Rev. 177, 178 (2002).
[2] *Id.*
[3] Map of Indian Gaming Locations, NATIONAL INDIAN GAMING COMMISSION https://www.nigc.gov/map (Last visited May 25, 2023).
[4] *E.g.,* Tribe-owned golf courses in the Pacific Northwest, INSIDE GOLF NEWSPAPER (August 3, 2021), http://www.insidegolfnewspaper.com/tribe-owned-golf-courses-in-the-pacific-northwest/.
[5] *E.g.,* Lisa Waterman Gary, 10 Native-American Owned Hotels, USA TODAY (August 8, 2014), https://www.10best.com/interests/hotels-resorts/10-native-american-owned-hotels/.
[6] Ward Williams, Native American-Owned Banks by State, INVESTOPEDIA, (January 9, 2023), https://www.investopedia.com/native-american-owned-banks-by-state-5085713.
[7] *E.g.,* Lendgreen Review: Read This Before You Borrow, CREDIT SUMMIT, https://mycreditsummit.com/lendgreen-review/.
[8] 11 U.S.C. §§ 101-1532.
[9] *Id.;* Bankruptcy Basics: A Primer, CONGRESSIONAL RESEARCH SERVICES (Oct 12, 2022), https://crsreports.congress.gov/product/pdf/R/R45137.
[10] 11 U.S.C. §§ 101-1532.
[11] Laura N. Coordes, Beyond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors, 35 EMORY BANKR. DEV. J. 363 (2019).
[12] In re Coughlin, 33 F.4th 600, 604 (1st Cir. 2022) cert granted sub nom. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 214 L. Ed. 2d 382, 143 S. Ct. 645, (2023).
[13] *Id.*

whether tribal sovereign immunity is abrogated by the Code. Part IV offers a preview of the case being presented to the Supreme Court of the United States in the 2023 term. In Part V, it discusses the implications of either outcome and then concludes with the author's analysis on how the court should rule on this issue.

I. A Primer on Tribal Sovereignty and Tribal Sovereign Immunity

This Part outlines the historical roots of tribal sovereign immunity and explains the "unequivocal" standard that courts apply in this area, as well as the ways that this standard has been interpreted by courts.

A) The Roots of Tribal Sovereign Immunity

Tribal sovereign immunity is fundamental to tribal sovereignty. Indian tribes in the United States are recognized by the courts as "separate sovereigns pre-existing the Constitution".[14] One inherent part of this sovereignty is sovereign immunity. Much like states and the federal governments, tribes generally hold a common law immunity to suits in state or federal court.[15] This sovereign immunity is fundamental to tribes ability to govern themselves. This immunity can be dispensed of either through waiver by the tribes themselves, or by Congress.[16] Congress, however, has the power to abrogate, or waive, tribal sovereign immunity.[17] This power comes from the U.S. Constitution which allows Congress to "regulate Commerce with foreign Nations . . .˘ and with the Indian Tribes."[18]

The Supreme Court has upheld tribal sovereign immunity, except when it is abrogated by Congress or waived by the tribes. The Court first recognized tribal sovereign immunity in 1919 in *Turner v. United States*.[19] In *Turner*, a non-Indian sued the Creek Nation for damages from destruction of a fence.[20] The Court held that liability was barred, saying that the Creek Nation could not be sued in court without their consent or authorization from Congress.[21] In the decades following this case, the Court continued to uphold tribal sovereign immunity.[22] In 1978, the Court heard *Santa Clara Pueblo v. Martinez*.[23] In *Martinez*, a female member of the Santa Clara tribe and her daughter attempted to sue both the tribe and its Governor under Title I of the Indian Civil Rights Act of 1968 (ICRA).[24] The Supreme Court held that in order to waive sovereign immunity in ICRA, there needed to be an "unequivocal expression" of Congressional intent to do so.[25] The Supreme Court applied the unequivocal expression standard for abrogating tribal sovereign immunity, holding that Title I of ICRA does not unequivocally abrogate tribal

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[14] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S. Ct. 1670, 1675 (1978).
[15] 1 Cohen's Handbook of Federal Indian Law § 7.05 (2019). See Turner v. United States, 248 U.S. 354, 358 (1919). Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165, 172-173.
[16] Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50 ADVOCATE 19, 19 (2007).
[17] U.S. CONST. art. I § 8, cl. 3. Thus, Congress has the power and authority to abrogate tribal sovereign immunity. *Martinez*, 436 U.S. at 510. *See also* Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P. C., 476 U.S. 877, 890 (1986).
[18] *Id.*
[19] Turner v. United States, 248 U.S. 354 (1919).
[20] *Id.*
[21] *Id.* at 358.
[22] Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50 ADVOCATE 19, 19 (2007).
[23] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).
[24] *Id.*
[25] *Id.*

immunity and thus, the tribes were immune from this suit and any other suits under ICRA.[26] The Court noted that nothing on the face of Title I claims to abrogate the immunity and there is no general waiver or congressional intent that indicates to waive tribal immunity.[27] Since *Santa Clara Pueblo*, the Supreme Court has continued to uphold tribal sovereign immunity and affirmed the unequivocal expression standard. Most recently in 2014, the Court again reiterated the unequivocal expression standard in *Michigan v. Bay Mills*[28] and referred to tribal sovereign immunity as a "necessary corollary to Indian sovereignty and self-governance."[29]

B) Meeting the "Unequivocal Expression" Standard

In the area of Federal Indian Law, there are several specific canons of constructions that courts use to interpret statutes as they apply to tribes. The unique historical nature between Indian Tribes and the United States government influences courts interpretation of federal statutes.[30] These standards serve as a helpful background for the determination of whether the unequivocal expression standard is met. One key canon of construction that is unique to Federal Indian Law is that statutes are to be construed "liberally in favor of the Indians".[31] Thus, ambiguous provisions should be interpreted to benefit the tribes.[32] This foundational canon lies at the backdrop of every standard in Federal Indian Law, including the "unequivocal expression" standard and is used by federal courts when statutory language is seen to be ambiguous in its impact on the tribes.

The law on waiver of sovereign immunity, generally, influences courts when interpreting statues as they relate to tribal sovereign immunity. The unequivocal expression doctrine is also used by courts when looking to waiver of sovereign immunity for other governmental bodies, including the federal government and state governments.[33] In this context, the Court has been clear that there are no "magic words" required to abrogate immunity.[34] The Court has required that the "scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretative tools".[35] Further, the Supreme Court has refused to take legislative history into account when determining whether a statute waives sovereign immunity.[36] If the statute is ambiguous, it should be construed in favor of immunity.[37]

Courts have generally held that Congress has unequivocally expressed their intent when Indian tribes are specifically referenced in the statutory language. For example, in *Osage Tribal Council v. US. Department of Labor*,[38] the Tenth Circuit found that Congress had unequivocally

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[26] *Id.*
[27] *Id.*
[28] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 134 S. Ct. 2024 (2014)
[29] *Id.* at 2030. (quoting Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986).
[30] *See* Oneida County v. Oneida Indian Nation, 470 U.S. 226, 470 U.S. 247 (1985).
[31] Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)

[32] See, e.g., Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (interpreting an ambiguous Montana state tax law as to benefit the tribes); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973) (holding a tax to be unlawful as applied to Indians on reservations) ; Choate v. Trapp, 224 U.S. 665, 675 (1912).
[33] *See, e..g.,* Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text").
[34] FAA v. Cooper, 566 U.S. 284, 291 (2012)
[35] *Id.*
[36] United States v. Nordic Vill. Inc., 503 U.S. 30, 31 (1992)
[37] United States v. Williams, 514 U.S. 527, 531 (1995);

[38] Osage Tribal Council ex. rel Osage Tribe of Indians v. U.S. Dep't of Lab., 187 F.3d 1174 (10th Cir. 1999)

intended to abrogate tribal sovereign immunity in the Safe Drinking Water Act.[39] In the Safe Drinking Water Act, Congress explicitly stated that municipalities were subject to suit and defined municipalities to include Indian tribes.[40] Similarly, in *United States v. Weddell*,[41] Congress was seen to have unequivocally intended to abrogate tribal sovereign immunity when it defined a "person" subject to suit to include "a state, a local government *or an Indian tribe*" in the Federal Debt Collection Procedure Act.[42]

Conversely, courts have generally followed the reverse logic: if the statute does not mention the tribes, then it does not unequivocally abrogate their immunity.[43] The Second Circuit found that tribal sovereign immunity was not waived in the Copyright Act as the language of the Copyright Act lacked any reference to the tribes.[44] Similarly, the Eleventh Circuit held that the Americans with Disabilities Act (ADA) did not allow suits against the tribes stating that Congress always "address[es] Indian tribes specifically and individually" when abrogating sovereign immunity.[45]

II. A Primer on the Bankruptcy Code and its Relation to Tribes and Tribal Sovereign Immunity

This Part outlines the history of the Bankruptcy Code and its basic functions. It then explains the relation between the Bankruptcy Code and the Tribes. While the Bankruptcy Code outlines a variety of different types of bankruptcy based on the type of debtor (individual, municipality, business, etc.), there are several key methods of declaring bankruptcy and key features to bankruptcy.[46] The details of each type of bankruptcy are beyond the scope of this Article, but the basics of bankruptcy are important for understanding the impacts of a decision on tribal sovereign immunity in this context. This Part goes on to explain the connection between Tribes and the Bankruptcy Code and how tribal sovereign immunity fits into this landscape.

a) Modern Bankruptcy and the Bankruptcy Code

The Bankruptcy Code was passed with the interests of both debtors[47] and creditors[48] in mind. The Bankruptcy Clause of the U.S. Constitution gave Congress the power to "establish… uniform Laws on the subject of Bankruptcies throughout the United States."[49] Under that authority, Congress passed the Bankruptcy Code in 1978.[50] The Code remains the primary

[39] *Id. See also* 42 U.S.C. §§ 300f-300j.
[40] 42 U.S.C. §§ 300f(10)("The term 'municipality' means a city, town or other public body created by or pursuant to State law, or an Indian Tribe).
[41] United States v. Weddell, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) (quoting 28 U.S.C. §§ 3001-3308)
[42] *Id. See also* 28 U.S.C. §§ 3001-3308.
[43] *See* Greggory W. Dalton, Notes and Comments, A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity, 81 Wash. L. Rev. 645 (2006).
[44] Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 356-59 (2d Cir. 2000).
[45] Florida Paraplegic Ass'n, Inc. v Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1132 (11th. Cir. 1999)
[46] Bankruptcy Basics: A Primer, CONGRESSIONAL RESEARCH SERVICES (Oct 12, 2022), https://crsreports.congress.gov/product/pdf/R/R45137.
[47] A debtor is defined as someone who owes debt or who can be compelled to pay claims or demands. *Debtor*, BLACK'S LAW DICTIONARY (9th ed. 2009).
[48] A creditor is defined as someone who debt is owed to or someone who gives credit. *Creditor*, BLACK'S LAW DICTIONARY (9th ed. 2009).
[49] U.S. CONST. art. I, § 8, cl. 4.
[50] 11 U.S.C. §§ 101-1532.

source of bankruptcy law in the United States.[51] The Bankruptcy Code outlines the processes for debtors to file for bankruptcy.[52] A debtor files for bankruptcy by filing a bankruptcy petition with the clerk of bankruptcy court.[53]

The "automatic stay" is one of the functions created under the Bankruptcy Code to protect both debtors and creditors. When a debtor files for Bankruptcy, the filing of the petition "stays the continuation of all nonbankruptcy judicial proceedings against the debtor."[54] This is referred to as an "automatic stay" as it is triggered automatically through the filing of bankruptcy and applies whether or not the other parties are aware of the bankruptcy proceedings.[55] Essentially, the automatic stay protects debtors from creditors by stopping them from attempting to collect debt or litigating against the debtor while the bankruptcy proceedings are underway.[56] It ensures that creditors cannot attempt to foreclose debts or harass debtors once they have filed for bankruptcy.[57] Further, it protects creditors by ensuring that others creditors do not act in ways that would be detrimental to other creditors.[58] If a creditor knowingly violates an automatic stay—such as by seeking to collect debt from a debtor—the debtor can seek damages from the creditor.[59] Thus, the stakes of an automatic stay are high for both the debtor and the creditor.

b) The Bankruptcy Code as it Relates to Tribes

The absence of reference to Indian tribes in the Bankruptcy code has led to confusion. The Bankruptcy Code does not mention Indian tribes in any of its sections.[60] It does not use any form of the word "Indian", "Tribes", or "Native Americans" or any other term that would indicate it is referring to Indian tribes.[61] The lack of reference to the tribes in the Code has led to confusion about its impact in many areas related to the tribes, including whether the tribes or tribal entities qualify as debtors or could file for bankruptcy.[62] Under the code, only a "person" or a "municipality" may be a debtor.[63] Person is broadly defined to include individuals, partnerships, and corporations but not governmental units.[64] Thus, under this definition, it is unlikely that

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[51] *Id.* Other Sources of Bankruptcy law in the United States include the Federal Rules of Bankruptcy Procedures, as well as other federal statutes or constitutional provisions that implicate bankruptcy concerns. See FED. R. BANKR. P. 1001-9037. See also 28 U.S.C. § 2075 (governing the promulgation of bankruptcy rules)

[52] *See* 11 U.S.C. §§ 101-1532.

[53] Bankruptcy begins in special bankruptcy courts and is administered by a bankruptcy judge who presides over the proceeding. These judges are not judicial officers under Article III of the U.S. Constitution and thus, do not exercise the "judicial power of the United States" in the same way that judges who meet the qualifications set in Article III are and thus, bankruptcy is reviewed and appealed to the Federal Judiciary and Article III judges. For that reason, the cases cited in this Article are generally from the Federal District or U.S. Circuit Courts. Bankruptcy Basics: A Primer, Congressional Research Services. (Oct 12, 2022). *See also* Article U.S. CONST. art. III (requiring life tenure and salary protection for Article III judges); 28 U.S.C. § 152 ("Each bankruptcy judge shall be appointed for a term of fourteen years").

[54] Bankruptcy Basics: A Primer, Congressional Research Services. (Oct 12, 2022) (quoting Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973 (1st Cir. 1997). *See also* 11 U.S.C. § 362(a)(1).

[55] 11 U.S.C. § 362.

[56] Bankruptcy Basics: A Primer, Congressional Research Services. (Oct 12, 2022) at 8.

[57] *Id.* at 9.

[58] *Id.* at 9.

[59] *Id.* at 9.

[60] 11 U.S.C. §§ 101-1532.

[61] *Id.*

[62] *See* Laura N. Coordes, Beyond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors, 35 EMORY BANKR. DEV. J. 363 (2019).

[63] *See* 11 U.S.C. §§ 101-1532.

[64] 11 U.S.C. § 101(41).

Tribes would fall under the definition of a person.[65] As will be discussed later in the Article, it is unclear whether tribes fall under the definition of "governmental unit". If they do, then this would be further proof that they cannot act as debtors in the way that "persons" can. Tribes also do not meet the definition municipalities as they are sovereigns, and not a subpart of a particular state.[66] Thus, it is unclear whether tribes are capable of filing for bankruptcy under the Code.[67]

c) The Bankruptcy Code and Sovereign Immunity

Bankruptcy Code (the Code) explicitly waives sovereign immunity for several groups but does not mention tribes specifically. In the bankruptcy context, Congress's waiver of sovereign immunity for many governments ensures that the Code applies to these governments, and they can be brought into court under the causes of action created in the Code. For example, when a debtor files for bankruptcy, the provisions of the bankruptcy code—such as the automatic stay—apply to the governmental entities whose sovereign immunity has been abrogated.

The Bankruptcy Code explicitly defines the groups whose sovereign immunity has been abrogated. In section 106(a) of the Code explicitly discusses sovereign immunity saying sovereign immunity is abrogated "as to a governmental unit".[68] The Code then provides that:

> [t]he term 'governmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or *other foreign or domestic government.*[69]

There is no debate as to whether this section of the Code abrogates sovereign immunity for states, commonwealths, foreign states, or any governmental structure that is explicitly mentioned within the definition of governmental unit.[70] This definition, however, does not specifically refer to Indian Tribes, Native Nations, or any other term generally used to reference Indian Tribes. As there is no mention of the tribes, this has left Federal Courts to decide whether the tribe's sovereign immunity is abrogated in the code or not.

III. The Federal Circuit Courts are Divided Over Whether the Bankruptcy Code Abrogates Tribal Sovereign Immunity

The Federal Circuits have come to different conclusions about the implications of the Bankruptcy Code on tribal sovereign immunity. This section discusses the two different paths taken by the circuits, as well as the current case up for review to the Supreme Court on this issue.

a) The Ninth Circuit's Holding in Krystal Energy v. Navajo Nation

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[65] *See* Coordes, *supra* n. 62.
[66] See Alexander Hogan, Protecting Native American Communities By Preserving Sovereign immunity and Determining the Place of Tribal Businesses in the Federal Bankruptcy Code, 43 COLUM. HUMAN RIGHTS L. REV. 569, 597 (2012).
[67] Coordes, *supra* n.62.
[68] 11 U.S.C.S. § 106
[69] 11 U.S.C.S. § 101(27) (emphasis added).
[70] Joshua Santangelo, Bankrupting Tribes: An Examination of Tribal Sovereign Immunity as Reparation in the Context of Section 106(a), 37 EMORY BANKR. DEV. J. 325, 344 (2021).

The Ninth Circuit held that the Bankruptcy Code meets the standard for abrogation of tribals sovereign immunity. In *Krystal Energy Co. v. Navajo Nation*[71], Krystal Energy brought an adversary action against the Navajo Nation in bankruptcy proceeding, alleging that the Nation was required to turnover certain assets under the Code.[72] The bankruptcy court and the district court dismissed the action based on the absence of any explicit abrogation of tribal sovereign immunity in the Bankruptcy Code.[73] The Ninth Circuit reversed concluding that the Tribes fall within the Bankruptcy Code's definition of "governmental unit" and thus, the explicit abrogation of sovereign immunity for governmental units was an unequivocal abrogation of tribal sovereign immunity.[74]

The Ninth Circuit based their holding primarily on the principal that Indian tribes are governments.[75] The court points out that there are no other forms of government other than foreign or domestic "unless one entertains the possibility of extra-terrestrial states".[76] While this argument may seem a bit out of this world, the Ninth Circuit's holding is fundamentally based on the plain meanings of the word "domestic" and "foreign", as well as the word "government'. The court reasoned that if all known governments fall into either the domestic or foreign category and tribes are a government, then the tribes must fall into the definition of "domestic or foreign governments."[77] Thus, the waiver of sovereign immunity would also be a waiver of tribal sovereign immunity.[78]

The court also points to the case of *Kimel*, in which the Supreme Court used similar logic in a case regarding the abrogation of state sovereign immunity. In *Kimel*, the Supreme Court held that the Age Discrimination Enforcement Act (ADEA) which read the Act as a whole when determining that state immunity was abrogated, despite a singular expression of this congressional intent.[79] Thus, under these standards the Ninth Circuit concluded that Congress intended to abrogate sovereign immunity of the states and any group that may assert sovereign immunity when it used the phrase "other foreign or domestic governments."[80]

Finally, the court points out the implications that would come from Indian tribes falling outside the definition of "governmental units".[81] Since the Code gives governmental units certain beneficial treatment elsewhere in the Code, such as discharges from certain forms of liability, the court reasoned that the tribes should also be afforded such benefits.[82] Thus, for all these reasons the Ninth Circuit concluded that the Indian tribes are "governmental units" under the Code and held that tribal sovereign immunity had been unequivocally expressed through the use of this phrase.

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[71] Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004).
[72] In re Krystal Energy Co., Inc., 308 B.R. 48, 50 (D. Ariz. 2002), rev'd and remanded sub nom. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004), as amended on denial of reh'g (Apr. 6, 2004). *See also* 11 U.S.C. § 542.
[73] *Id.*; In re Krystal Energy Co., Inc., No. 2-01-00166-ECF-SSC, 2001 WL 34395864, at *1 (Bankr. D. Ariz. Oct. 22, 2001).
[74] Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1057 (9th Cir. 2004).
[75] *Id.* at 1057.
[76] *Id.* at 1057.
[77] *Id.*
[78] *Id.*
[79] *Id*. at 1058.
[80] *Id.* at 1059 (quoting 11 U.S.C.S. § 101(27)
[81] *Id.*
[82] *Id. See also* 11 U.S.C. § 523.

b) The Sixth Circuit holding in In Re Greektown Holdings

Contrary to the Ninth Circuit's holding in *Krystal Energy*, The Sixth Circuit held that Congress did not abrogate tribal sovereign immunity through the Bankruptcy Code.[83] In *In Re Greektown Holdings*[84], the Sixth Circuit held that the definition of governmental unit in the Bankruptcy Code does not meet the standard for unequivocal abrogation of tribal sovereign immunity.[85] The court's holding rested primarily on two main arguments. First, the court based their opinion on the assumption that Congress is aware of and understood judicial precedent when passing the Bankruptcy Code.[86] Second, the court was convinced by the Seventh Circuit's reasoning in the similar case of *Meyers v. Oneida Tribe of Indians of Wisconsin*.[87]

The Sixth Circuit concluded that as Congress is aware of the judicial precedent for abrogating tribal sovereign immunity, it cannot be assumed that they abrogated immunity in this context.[88] The Sixth Circuit reiterated the standard that Congress has the power to abrogate tribal sovereign immunity, but it must "unequivocally express" their intent to do so.[89] In analyzing whether Congress has unequivocally expressed this purpose, the court looks to Congress's knowledge and standard practice for abrogation of tribal sovereign immunity.[90] Generally, courts assume that Congress is aware of the relevant judicial precedent when they enact statutes.[91] The Sixth Circuit further notes that the Bankruptcy code was passed six months after the United States Supreme Court's decision in *Santa Clara Pueblo* that reaffirmed the unequivocal requirements.[92] This timing, as well as the standard assumption of Congress's knowledge of precedent, led the Sixth Circuit to conclude that Congress knew that they needed an unequivocal expression.[93] Further, the court concluded that Congress understood the meaning of "unequivocal" expression of abrogation as in several acts preceding the Bankruptcy Code, they have done so using the phrase "authorizing suits against an 'Indian tribe'" in two pieces of legislation passed in the years before the Code .[94] These conclusions were fundamental to the Sixth Circuit's holding that there was not unequivocal abrogation.

Additionally, the Sixth Circuit rested their decision on the Seventh Circuit's analysis of "functionally equivalent language" in *Meyers*.[95] In *Meyers*, a putative class action was brought against the Oneida Tribe under the Fair and Accurate Credit Transaction Act (FACTA).[96] At issue in *Meyers* was whether FACTA's definition of "person" which includes "any government" included Indian tribes and thus, whether that served as an abrogation of tribal sovereign

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[83] Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC), 917 F.3d 451 (6th Cir. 2019).
[84] *Id.*
[85] *Id.*
[86] *Id.* at 456.
[87] *Id* at 457; Meyers v. Oneida Tribe of Indians of Wisconsin, 836 F.3d 818 (7th Cir. 2016).
[88] *In Re Greektown Holdings*, 917 F.3d at 456.
[89] *Id.*
[90] *Id.*
[91] *Id. See also* See Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").
[92] *In Re Greektown Holdings*, 917 F.3d at 456.
[93] *Id.*
[94] *Id.* at 457. *See e.g.,* 42 U.S.C. § 6972(a)(1)(A) (authorizing suits against an "Indian Tribe"); 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits against an "Indian tribe").
[95] *In Re Greektown Holdings*, 917 F.3d at 456.
[96] *Meyers*, 836 F.3d at 818.

immunity.[97] The *Meyers* court held that FACTA did not abrogate tribal immunity, relying both on unequivocal standard of abrogation and on the canon that ambiguities in statutes shall be determined in favor of the Indian Tribes and thus, that government does not include the Tribes.[98] The Sixth Circuit followed the Seventh Circuit logic in *Meyers* in their decision in *In Re Greektown* and were similarly convinced by that Congress had left doubt about its intent in the Bankruptcy Code.[99] Based on the doubt in intent, the Sixth Circuit concluded that they could not hold that Congress had unequivocal intent and thus came to the alternative conclusion as the Ninth Circuit and ruled in favor of the Tribes holding that their sovereign immunity has not been abrogated.[100]

IV. The Supreme Court has Taken Up This Issue by Granting Cert in *Coughlin v. LAC Du Flambeau Band*

The First Circuit weighed in on the disagreements amongst the circuit courts and followed in the Ninth Circuit's footsteps holding that tribal sovereign immunity was abrogated by the Bankruptcy Code. This case has subsequently been brought to the United States Supreme Court. This section will outline the facts and procedure behind this case, as well as the case being brought to the Supreme Court and relevant stakeholders.

A) The Facts of Coughlin v. LAC Du Flambeau Band

Coughlin took oat a $1,100 loan from Lendgreen, a subsidiary of the Lac de Flambeau Band of Lake Superior Chippewa Indians.[101] Coughlin then filed for bankruptcy and listed his debt to Lendgreen.[102] After Coughlin filed his petition, an automatic stay was placed on his debts but Lendgreen continued to contact Coughlin about the repayment of his debts.[103] Coughlin told Lenggreen that he had filed for bankruptcy but they continued to contact him about repayment.[104] Two months after his petition, Coughlin attempted suicide. Coughlin attributes this attempt to the "mental and financial agony" and blamed this agony on Lendgreen and their constant communication with him.[105]

Despite the sympathetic nature of the facts in *Coughlin*, the issue presented to the court in this matter is the same as in both *In Re Greektown Holdings* and *Krystal Energy*: did Congress unequivocally express the intent to abrogate tribal sovereign immunity in the Bankruptcy Code?

B) The First Circuit's Opinion

The First Circuit followed the Ninth Circuit's logic in *Krystal Energy* and similarly held that tribal sovereign immunity was abrogated. The First Circuit, similarly to the Ninth, concluded that

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[97] *Id.*
[98] *Id.* at 826.
[99] *In Re Greektown Holdings*, 917 F.3d at 456.
[100] *Id.*
[101] In re Coughlin, 33 F.4th 600, 604 (1st Cir. 2022) cert granted sub nom. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 214 L. Ed. 2d 382, 143 S. Ct. 645, (2023).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

the main issue in determining whether tribal sovereign immunity was abrogates rested in whether the tribes met the definition of "domestic government".[106] The court then stated that tribes plainly fall within the meaning of governments as they act as governing authorities.[107] Further, since the tribes are within the bounds of the United States, the court asserts that this meets the plain definition of domestic.[108]

Beyond the plain meaning of the statute, the court concluded that the historical context, as well as the structure of the bankruptcy code also indicate that tribal sovereign immunity was unequivocally abrogated.[109] The court points to the fact that Congress was aware of the definition of "governmental unit" when it wrote § 106 and knew that tribes were "domestic dependent nations".[110] Finally, the court looks to the structure of the act and argues that because Congress both stripped immunity and granted benefits to governmental units, tribes will benefit from their status as governmental units.[111]

Importantly, the court did not apply any of the Federal Indian law canons of construction, as it interpreted the Bankruptcy Code to be unambiguous as "domestic governments" clearly includes the tribes.[112]

V. An Analysis of the Implications of the Supreme Court's Potential Holdings and Why These Implications Should Lead to a Holding for the Tribes

a) Implications of a Holding for the Debtor

A holding for the debtor, Coughlin, would clarify and simplify Bankruptcy law for the tribes and for all entities with the current bankruptcy system. Currently, it is unclear whether Tribes and their subsidiaries can be hauled into bankruptcy court or whether automatic stays have an impact on their ability to collect debt from debtors. A holding for Coughlin by the Supreme Court would clarify that the tribes do fall under the law of the Bankruptcy Code and do not hold a unique place in this type of law which would ease the role of bankruptcy judges across the country.

While the implications in the bankruptcy context would not be drastic for the tribes, a holding for Coughlin may have serious implications for tribal sovereignty and the role of Indian tribes in federal law. A holding for Coughlin would redefine the "unequivocal standard" in such a way that statutes would not need to mention the tribes in order to have unequivocally intended to abrogate their immunity. It also would mean that even without the mention of the tribes, the Court is either seeing statutes like the Bankruptcy Code as unambiguous, and thus not applying the canons of construction for tribal law[113] or that the court is choosing to ignore the canons of construction. Either of these implications may lead to harm for the tribes.

In essence, although a holding for the debtor in this case would not seriously harm the tribes in regard to bankruptcy, it would show general trend away from upholding tribal sovereign immunity. Thus, the court would be undermining principles of sovereign immunity.

b) Implications of a Holding for the Tribes

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[106] *Id.* at 606.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 607.
[110] *Id.*
[111] *Id.* at 608.
[112] *Id.*
[113] *Supra* Part I.B.

Alternatively, a holding for the tribe in Coughlin would solidify the Court's support for Indian tribes and tribal sovereignty. A holding for the tribe would follow the current rule that in order to abrogate sovereign immunity, Congress must at least mention the tribes. It would remind Congress of the importance of considering the tribes in their legislation and solidify the Court's support of tribal sovereignty.

The implications of a holding for the tribe, in regard to bankruptcy proceedings, may be complicated. If tribes are immune from bankruptcy proceedings, then this could create complications for bankruptcy courts and debtors, like the one represented by the case of Brian Coughlin and the mental agony created by the attempts to collect from Lendgreen.[114] Further, tribal sovereign immunity in the bankruptcy context could lead to an increase in tribal creditors or people attempting to evade bankruptcy proceedings by being deemed tribal entities. These consequences, as will be argued in the rest of this Article, should not lead to a finding for the debtor, but should lead Congress to act to fix the bankruptcy system.

c) An Emphasis on Whether Tribes are "Domestic Governments" is Misguided

The First and Ninth Circuit focus too much on the plain meaning of "domestic governments".[115] The standard for abrogation is that Congress must unequivocally abrogate tribal sovereign immunity. This is rooted in the long history of tribal sovereignty and the fact that tribes have been on United States soil since time immemorial.[116] Instead of focusing on the meaning of "unequivocal expression", the First and Ninth Circuit focus their analysis on the plain meaning of the Bankruptcy Code and whether tribes should be considered government.[117]The tribes do not contest, nor would they, that they are governments. In fact, their governmental status is exactly what leads them to possess sovereign immunity. The tribes in these various cases contend, not that they are not governments, but that Congress must be clear in the passage of their laws if they intend to abrogate sovereign immunity.[118] Looking at the definition of governmental unit, Congress explicitly references many groups, but does not mention tribes.[119] Congress has shown that when they want to explicitly abrogate tribal sovereign immunity, they reference the tribes specifically.[120] To be unequivocal, it must be more than just a passing phrase that the tribes may fit into, but an intentional abrogation.[121]

Although there are no "magic words" necessary to meet the standard of unequivocal intent to abrogate sovereign immunity, it is not clear that Congress was thinking about the tribes in any capacity when they passed the Bankruptcy Code.[122] There is no language that refers to tribes explicitly, and no language that mirrors any of the other abrogation of tribal immunity.[123] As was pointed out by the Sixth Circuit in *In Re Greektown Holdings*, Congress had

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[114] Supra Part IV.A.
[115] See Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004); In re Coughlin, 33 F.4th 600, 604 (1st Cir. 2022).
[116] *Supra* Part I.A.
[117] *Supra* Part I.B.
[118] E.g., Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004); In re Coughlin, 33 F.4th 600, 604 (1st Cir. 2022).
[119] *Supra* Part II.B.
[120] *Supra* Part I.B.
[121] *Id.*
[122] *Id.*; *supra* Part II.B-C.
[123] *Supra* Part II.B-C.

unequivocally abrogated tribal sovereign immunity several times in the years before the Bankruptcy Code was enacted. Each time it did so by explicitly mentioning the tribes.[124]

Even if the First and Ninth Circuits are correct that the tribes fall under the definition of "domestic governments" this should lead the Supreme Court, at best, to a finding that the statute is ambiguous. In the face of an ambiguous statute, the court should turn to the canons of construction in Federal Indian Law and the norms for interpreting sovereign immunity abrogation statutes.[125] Both of these would lead to a finding against abrogation of immunity and for the tribes.

Thus, whether the tribes meet the plain language definition of "domestic government", as written in the Code, is not—as the First and Ninth Circuit have held— a final determination about the abrogation of sovereign immunity. The ambiguous nature of the Code clearly does not meet the standard of a "unequivocal expression" and thus, a holding for the debtor would be substantially altering the Code and assuming Congressional intent that is not clear on the face of the statute.

d) Emphasis on Benefits to the Tribe are also Misguided

The First and Ninth Circuit's also make structural arguments for abrogation based on the benefits for the tribes if they met the definitions of "governmental unit". Again, both circuits are failing to look to the standard for abrogation. Nowhere in the historical analysis of whether Congress unequivocally intended to abrogate immunity is there a question of whether the tribes would benefit from the abrogation or from the statute. The question of whether the tribes would benefit from being seen as "governmental units" in the Code is wholly unrelated to the intention of Congress. If Congress wanted to define "governmental unit" to include tribes, they could have done so. But as the Code currently stands, it has not.

In fact, it is possible that many practical concerns could be solved by the finding that tribes are seen as "governmental units" under the code. The facts of *In Re Coughlin* clearly indicate that there are real financial and social stakes at play when people cannot be freed from their debts to tribal entities through filing for bankruptcy.[126] But the realities of bankruptcy and of the Bankruptcy Code themselves are wholly separate from the issue of tribal sovereignty that is at stake in this case.

e) The Bankruptcy Complications that May Arise from This Holding Should Be Solved by Congress

Congress must amend the Bankruptcy code to make a path for the tribes. While a holding for the tribes in *Coughlin* will lead to many complications for bankruptcy and the possibility of creditors using tribes to evade bankruptcy proceedings, this should not lead to a destruction of tribal sovereignty principles. When enacting the Bankruptcy Code, Congress did not write provisions that clearly indicates the tribes role in the Bankruptcy process. As was discussed above, tribes role in the bankruptcy code is generally unclear and many other aspects of confusion, like whether they are seen as debtors, will not be wholly solved by a finding for the debtor.[127] The lack of consideration of tribes was a failure of Congress and not a reason to amend the canons of tribal construction. It is the duty of Congress to amend or write a new law that

[124] *Supra* Part I.B.
[125] *Id.*
[126] *Supra* Part IV.A.
[127] *Supra* Part II.B.

reflects the role of the tribes as sovereign governments and as important parts of our modern-day financial systems.

CONCLUSION

While the case at the Supreme Court may seem fairly simple, the implications for both bankruptcy proceedings and Federal Indian Law as a whole are large and complex. Although the current Supreme Court is likely to hold that sovereign immunity has been abrogated, as this is the less controversy surrounding the Bankruptcy Code, for the reasons discussed in the final section of this Article this would a disservice to Federal Indian Law. It is important that Congress fully takes the unique role of the Tribes into account when writing and passing statutes and the Court should not take it upon themselves to rewrite the statute for them. Regardless of the holding in *Coughlin*, there are several remaining questions that need to be answered about the role of tribes in the bankruptcy system. Without congressional action, the federal courts will be left to answer these questions on their own and confusion and disagreement will likely ensue.

Applicant Details

First Name	**Kathryn**
Middle Initial	**M.**
Last Name	**Gantley**
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Contact Phone Number	**3154093690**

Applicant Education

BA/BS From	**State University of New York-College at New Paltz**
Date of BA/BS	**May 2017**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 24, 2020**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**International Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Cornell Law School Moot Court Board**

Bar Admission

Admission(s)	**Colorado, District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

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References

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(607) 255-8694
Energy Law professor (formerly at Cornell Law School)
This applicant has certified that all data entered in this profile and any application documents are true and correct.

880 P St NW, Apt. 302
Washington, D.C. 20001

June 25, 2023

The Honorable Morgan Christen
U.S. Court of Appeals for the Ninth Circuit
605 W 4th Ave, Suite 252
Anchorage, AK 99501

Dear Judge Christen,

I am an energy regulatory attorney in private practice in Washington, D.C. seeking a clerkship in your chambers for the 2025-2026 term. My resume, transcripts, and writing sample are enclosed. Letters of recommendation from Joshua Macey, Matthew Christiansen, and Patricia Hurt will follow.

Please do not hesitate to contact me should you require additional information. Thank you for your time and consideration.

Sincerely,

Kathryn Gantley

Kathryn Gantley

Enclosures

KATHRYN M. GANTLEY

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EXPERIENCE

BAKER BOTTS | ASSOCIATE · Washington, D.C.
September 2022 – Present

- Draft and submit filings such as protests, complaints, and motions to federal and state energy regulatory bodies on issues such as tariff and contract interpretation and the just and reasonableness of rates
- Draft applications for approval by the Federal Energy Regulatory Commission (FERC or Commission) of the sale and purchase of transmission assets pursuant to section 203 of the Federal Power Act
- Prepare testimony to support proposed rates for renewable natural gas facility and associated pipeline before state regulatory body
- Draft memoranda advising clients on strategic resolution of legal issues such as contract modification and the regulatory implications of clients' proposed actions
- Research substantive and procedural legal standards to advise clients on how to resolve multi-billion dollar issues and draft litigation and dispute resolution strategies for multiple fora based on such research
- Review and revise talking points for company leadership meetings with adverse parties
- Review and monitor regulatory proceedings and rulemakings to ensure clients' compliance with applicable regulatory regimes
- Represent plaintiff in family law dispute on a pro bono basis before the Superior Court of the District of Columbia

FEDERAL ENERGY REGULATORY COMMISSION | OFFICE OF ADMINISTRATIVE LAW JUDGES
ATTORNEY-ADVISOR · Washington, D.C.
August 2020 – August 2022

- Analyzed legal arguments and technical energy information to advise Administrative Law Judges (Judges) and Chief Judge Cintron on strategies and solutions to reach reasoned decisions
- Oversaw administrative hearings, drafted orders on discovery motions, and reviewed testimony and exhibits to draft initial decisions
- Oversaw a three-month long hearing and drafted an initial decision on the valuation of Resid in the Trans Alaskan Pipeline System on a case that was before FERC on voluntary remand from the United States Court of Appeals for the District of Columbia Circuit
- Researched caselaw and FERC policy standards to draft procedural and substantive orders in a variety of proceedings
- Reviewed settlement proposals and drafted recommendations to the Commission on whether to approve, modify, or reject the settlement
- Managed large, long-term projects by organizing and assigning work and communicating deadlines clearly

CORNELL UNIVERSITY | TEACHING ASSISTANT · Ithaca, NY
August 2019 – May 2020

- Assisted professors in Business Law, Business and Hospitality Law, and Legal Aspects of Land Use Planning courses
- Discussed cases and key issues with professors in order to counsel students and grade exams
- Counseled students one-on-one and convened large study sessions with students to help them prepare for their exams

FEDERAL ENERGY REGULATORY COMMISSION | OFFICE OF COMMISSIONER GLICK
LEGAL INTERN · Washington, D.C.
July 2019 – August 2019

- Assisted Commissioner Glick's team of advisors in reviewing and revising the Commissioner's concurrences and dissents on the Commission's outgoing open meeting orders
- Researched and advised Commissioner Glick's office on the scope and application of NEPA requirements in environmental impact assessments of proposed natural gas pipeline projects

PHILLIPS LYTLE LLP | SUMMER ASSOCIATE · Buffalo, NY
May 2019 – July 2019

- Drafted memoranda on New York State (NYS) Public Service Commission filings to advise clients on how to respond to such filings
- Drafted client alert on new chemical regulations in NYS
- Drafted notice of motion, affirmation, and memorandum of law for a motion to dismiss action
- Drafted four of six sections of the Chambers Global Practice Guide on alternative energy and power
- Drafted memoranda to advise telecommunications clients on recent changes in the case law and interpretation of the Telecommunications Act, and to advise clients on how they should proceed in future cell siting processes

SUNY NEW PALTZ OFFICE OF COMMUNICATIONS & MARKETING | PHOTOGRAPHY INTERN · New Paltz, NY
August 2016 – May 2017

- Photographed events to capture and showcase the essence of SUNY New Paltz for advertising, news, and media communications
- Photographed the Ottaway Visiting Professors Roundtable and Reception at the New York Times building
- Assisted in large-scale photo shoots by photographing different perspectives from the lead photographer

EDUCATION

CORNELL LAW SCHOOL | Ithaca, NY
Juris Doctor, May 2020
GPA: 3.37
Honors:

- *CALI Award Recipient*, Energy Law
- *Honorable Frederick J. Scullin Jr. Scholarship*, 2018 Cornell Law School Recipient

Activities:

- *Cornell International Law Journal*, Senior Online Editor, Social Chair
- *Cornell Law School Moot Court Board*, Board Member
- *Cuccia Cup Moot Court Competition*, Round of 32

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ | New Paltz, NY
B.A., *cum laude*, in English and Environmental Studies, May 2017
GPA: 3.53
Honors: *Chi Alpha Sigma Honor Society*
Activities: New Paltz Women's Cross Country, 2013-2016

INTERESTS

Reading; hiking; rock climbing; running: Wineglass Marathon 2019, Jim Thorpe Marathon 2021; cycling: RAGBRAI 2016, 2018; photography

Cornell Law School - Grade Report - 06/16/2023

Kathryn M Gantley

JD, Class of 2020

Course	Title	Instructor(s)	Credits	Grade	
Fall 2018 (8/21/2018 - 12/17/2018)					
University of Maryland Baltimore, 30 credits of advanced standing.					
LAW 6131.1	Business Organizations	Awrey	4.0	B	
LAW 6340.1	Energy Law	Macey	3.0	A	CALI
LAW 6511.1	Intellectual Property	Liivak	3.0	A-	
LAW 6647.101	Law and Policy of Food Systems	Torres, Benzer Kerr, Gates	3.0	B+	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	43.0	43.0	43.0	43.0	13.0	13.0	3.4615
Cumulative	43.0	43.0	43.0	43.0	13.0	13.0	3.4615

Spring 2019 (1/22/2019 - 5/10/2019)					
LAW 6011.1	Administrative Law	Rachlinski	3.0	B-	
LAW 6301.202	Directed Reading	Macey	2.0	SX	
LAW 6783.1	Professional Responsibility	Reed	3.0	B	
LAW 7847.301	International Human Rights Clinic: Policy Advocacy I	Kalantry	5.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	11.0	11.0	3.2145
Cumulative	56.0	56.0	56.0	56.0	24.0	24.0	3.3483

Fall 2019 (8/27/2019 - 12/23/2019)					
LAW 6121.1	Bankruptcy	Lienau	3.0	A-	
LAW 6401.1	Evidence	Colb	4.0	B+	
LAW 6871.602	Supervised Writing	Macey	2.0	SX	
LAW 7075.101	Human Rights as Animal Rights and Vice-Versa	Colb/Dorf	3.0	B+	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	12.0	12.0	12.0	12.0	10.0	10.0	3.4320
Cumulative	68.0	68.0	68.0	68.0	34.0	34.0	3.3729

Spring 2020 (1/21/2020 - 5/8/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 6201.1	First Amendment: Religion Clauses	Tebbe	3.0	SX	
LAW 6803.101	Roman Law: Slavery, Crime, and Gender	Giannella, Nicole	4.0	SX	
LAW 7775.101	Critical Perspectives on Law	Anker	3.0	SX	
LAW 7925.301	New York Attorney General Practicum 1	Callery/McArdle/Sutton	6.0	SX	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	0.0	0.0	N/A
Cumulative	84.0	84.0	84.0	84.0	34.0	34.0	3.3729

Total Hours Earned: 84

Received JD on 05/24/2020

OFFICIAL TRANSCRIPT OF ACADEMIC RECORD

Transcript of Academic Record

Student No: N02752109
Record Of: Kathryn M. Gantley
DOB: 14 - Dec

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(845) 257-3100

Date Issued: 1/26/2018

Issued To:

Kathryn Gantley
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Degree Number: 1
Degree Awarded: Bachelor of Arts 24-MAY-2017

Program : Bachelor of Arts
College : Liberal Arts and Science
Major : English
Minor : Environmental Studies
Inst. Honors : Cum Laude

SUB NO.	COURSE TITLE	CRED	GRD	R	PTS

Degree Number: 1
Degree Awarded: Bachelor of Arts 24-MAY-2017

Program : Bachelor of Arts
College : Liberal Arts and Science
Major : English
Minor : Environmental Studies
Inst. Honors : Cum Laude

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

Spring 2012	Onondaga CC-NY			
ENG 160	Fresh/Comp I	3	TA	
MAT 001	Pre-Calc W/ Trig	4	TB	
Spring 2013	Onondaga CC-NY			
ARS 000	Digital Dsgn Non-Dsg	3	TA	
ENG 180	Fresh/Comp II	3	TA	
MAT 251	Calculus I	4	TA-	
Fall 2013	Advanced Placement			
BIO 293	AP Biology	3	AP	
POL 193	AP Govt & Polit:United States	3	AP	

Transfer Hours Accepted:

2-Year	4-Year	AP	Total
17	0	6	23

INSTITUTION CREDIT:

Fall 2013					
BIO 170	Human Biology	3	A-		11.01
ENG 224	Expository Writing	3	B+		9.99

********** CONTINUED ON NEXT COLUMN **********

SUB NO.	COURSE TITLE	CRED	GRD	R	PTS
Institution Information Continued:					
ITA 101	Elementary Italian 1	3	W		.00
PHI 120	Intro to Philosophy:Classics	3	B-		8.01
SOC 100	Intro Sociology	3	B		9.00
	Semester Ehrs: 12	QPts:			38.01
	GPA-Hrs: 12	GPA:			3.16
	Cumulative Ehrs: 12	QPts:			38.01
	GPA-Hrs: 12	GPA:			3.16
Good Standing					
Spring 2014					
ANT 303	Indians of North America	3	B-		8.01
ARS 140	Introduction to Painting	3	B+		9.99
GEO 240	World Geography	3	B+		9.99
HIS 221	US History to 1865	4	A		16.00
	Semester Ehrs: 13	QPts:			43.99
	GPA-Hrs: 13	GPA:			3.38
	Cumulative Ehrs: 25	QPts:			82.00
	GPA-Hrs: 25	GPA:			3.28
Dean's List					
Good Standing					
Fall 2014					
ENG 303	Intro to British Literature	4	A		16.00
ENG 333	Intro to American Literature	4	B+		13.32
ENG 343	Transnational Literature	4	A-		14.68
PHI 336	Philosophy of Language	3	B		9.00
	Semester Ehrs: 15	QPts:			53.00
	GPA-Hrs: 15	GPA:			3.53
	Cumulative Ehrs: 40	QPts:			135.00
	GPA-Hrs: 40	GPA:			3.37
Dean's List					
Good Standing					
Spring 2015					
ECO 206	Principles of Microeconomics	3	C+		6.99
ENG 300	Seminar in Critical Practice	4	A-		14.68
ENG 345	Creatv Wrtg Workshop 1	3	A-		11.01
ENG 425	The Epic Tradition	3	B+		9.99
ENG 468	Lit, Evo, and the Brain	3	B+		9.99
	Semester Ehrs: 16	QPts:			52.66
	GPA-Hrs: 16	GPA:			3.29
	Cumulative Ehrs: 56	QPts:			187.66
	GPA-Hrs: 56	GPA:			3.35
Good Standing					

********** CONTINUED ON PAGE 2 **********

Stella Turk

Stella Turk, Registrar

THIS TRANSCRIPT HAS AN ANTI-COPY ENCRYPTED ALPHA-NUMERIC BACKGROUND. VOID WHEN COPIED

KEY TO TRANSCRIPT PRINTING APPEARS ON THE REVERSE SIDE

OFFICIAL TRANSCRIPT OF ACADEMIC RECORD

Transcript of Academic Record

Student No: N02752109
Record Of: Kathryn M. Gantley
DOB: 14 - Dec

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Date Issued: 1/26/2018

SUB NO.	COURSE TITLE	CRED	GRD	R	PTS
Institution Information Continued:					
Fall 2015					
EGG 250	Renewable Energy	0	W		.00
ENG 406	Shakespeare 1:Selected Works	4	A		16.00
ENG 494	Fieldwork in English	3	A		12.00
GEO 272	People-Environment Relations I	3	A		12.00
GER 101	Elementary German 1	3	A		12.00
MAT 185	Statistics and Public Policy	3	A-		11.01
	Semester Ehrs: 16 QPts:				63.01
	GPA-Hrs: 16 GPA:				3.93
	Cumulative Ehrs: 72 QPts:				250.67
	GPA-Hrs: 72 GPA:				3.48
Dean's List					
Good Standing					
Spring 2016					
ABD 331	Study Abroad Belgium	0	O		.00
SAB 131	Elementary French 1	3	A-		11.01
SAB 231	Humanitarian Law	3	B+		9.99
SAB 331	Internship	3	A		12.00
SAB 331	Pol Enrgy Secrty Strat Globl	3	A		12.00
	Semester Ehrs: 12 QPts:				45.00
	GPA-Hrs: 12 GPA:				3.75
	Cumulative Ehrs: 84 QPts:				295.67
	GPA-Hrs: 84 GPA:				3.51
Good Standing					
Fall 2016					
CHE 100	Environmental Chemistry	3	B		9.00
ENG 423	Contemporary Literary Theory	4	A		16.00
GLG 205	Environmental Geology	4	B+		13.32
SOC 317	Environmental Sociology	3	A-		11.01
	Semester Ehrs: 14 QPts:				49.33
	GPA-Hrs: 14 GPA:				3.52
	Cumulative Ehrs: 98 QPts:				345.00
	GPA-Hrs: 98 GPA:				3.52
Good Standing					
Spring 2017					
ARS 150	Intro to Photography	3	W		.00
ENG 451	Senior Seminar	4	B+		13.32
GER 102	Elementary German II	3	A		12.00
POL 393	Pol Sci Selected Topic	3	A-		11.01
	Semester Ehrs: 10 QPts:				36.33
	GPA-Hrs: 10 GPA:				3.63
	Cumulative Ehrs: 108 QPts:				381.33
	GPA-Hrs: 108 GPA:				3.53
Good Standing					
****** DEGREE 1 (UNDERGRADUATE) TRANSCRIPT TOTALS ******					
INSTITUTION	Ehrs: 108 QPts:				381.33
	GPA-Hrs: 108 GPA:				3.53
TRANSFER	Ehrs: 23 QPts:				.00
	GPA-Hrs: 0 GPA:				.00
OVERALL	Ehrs: 131 QPts:				381.33
********** CONTINUED ON NEXT COLUMN **********					

SUB NO.	COURSE TITLE	CRED	GRD	R	PTS
Totals Continued:					
	GPA-Hrs: 108 GPA:				3.53
********** END OF TRANSCRIPT **********					

Stella Turk, Registrar

THIS TRANSCRIPT HAS AN ANTI-COPY ENCRYPTED ALPHANUMERIC BACKGROUND. IF IT APPEARS "VOID" WHEN COPIED

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KEY TO TRANSCRIPT PRINTING APPEARS ON THE REVERSE SIDE

June 22, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am writing to provide a reference for Kathryn (Katie) Gantley, who is applying for a law clerk position. Katie served as my law clerk at the Federal Energy Regulatory Commission (FERC) from 2020 through 2022. In addition, she clerked for the Chief Judge and helped out other judges, as needed.

Katie started her clerkship during the height of the COVID-19 quarantine. FERC conducted all business through virtual means, including hearings, settlement conferences, and collaboration. Building rapport and mentoring law clerks was challenging during quarantine, but Katie was eager for the mentoring relationship. She was personable and quick-witted, and had limitless patience with my occasionally repetitive stories. The only weakness I found was a deplorable lack of knowledge for my (perhaps dated) pop references.

FERC practice encompasses a variety of different academic disciplines, including engineering, economics, accounting, and finance. Katie can assimilate a vast quantity of information and reduce complex issues to concise, understandable passages. As an adherent of Brian Garner, I was delighted to find that I did not need to train Katie in my writing style. Her writing was straightforward and easily understandable, yet did not lose the sophistication that I expect from law school graduates. Katie was able to translate complex issues into accessible text for the varied audiences that consume FERC decisions. Her research was comprehensive and timely. Often, Katie would anticipate my needs and have the research ready for me before I even asked for it.

Her communication was professional, nuanced and appropriate at all times. She interacted with internal personnel including judges, other clerks, paralegals, and clerical staff with the warmth, intimacy, and respect of serving on the same team. When she communicated with outside parties, she conveyed the notion that she was speaking with authority “for the judge” without devolving into imperiousness. I knew I could depend on Katie to convey my intentions unequivocally in a respectful and professional manner.

The proper title of a law clerk at FERC is “attorney-advisor.” I view my law clerk as part of a team. I rely on the advisory capacity, and encourage my clerk to contribute ideas, critique court appearances, offer opinions and comment on actions I contemplate. My team often expands for particularly large cases, to include additional law clerks and industry experts. Although I am the ultimate decision maker, I find the synergy of the team environment helps me to draft legally sound and well-reasoned decisions.

Katie also demonstrated excellent leadership qualities while on my service. Her exceptional organizational skills were invaluable as she kept me on schedule, and mobilized the clerk corps to assist with cite checking and proofreading before issuances. Katie did this not only for my issuances, but for other judges as well. Although our clerks all worked for different judges, they considered themselves a team and assisted each other.

To give a specific example, Katie assisted me with one of my largest cases to date. Disagreements about the Trans Alaska Pipeline System (TAPS) Quality Bank have rebounded through FERC, the Regulatory Commission of Alaska and the D.C. Circuit Court of Appeals through several iterations, at the expense of considerable resources and time. The hearing was held virtually from September through November and was comprised of 847 exhibits, 17 expert witnesses, and 39 volumes of transcripts. To accommodate participants in Alaska and on the West Coast, the hearing started later in the day and often ran until 7:00 pm EST or later. January through May was spent drafting the Initial Decision for TAPS. It was a delicate decision, because it required interweaving evidence from the hearing and two prior proceedings on which the parties relied. Katie was knowledgeable about the substance of all three proceedings, and demonstrated a phenomenal memory for where something could be found. Katie drafted a number of substantive sections for the decision, which required few revisions and were well-supported by record evidence. She made significant contributions to the decision with only light guidance. Moreover, being able to “bounce” ideas off her helped me to draft some of the more nuanced and delicate portions of my decision. Katie was able to zero in on gaps in my reasoning, thereby sharpening my argument.

I cannot describe Katie’s weaknesses because I frankly did not observe any. Her writing, communication, ability to absorb and understand large quantities of extremely complex material, organization, and leadership were all outstanding. I have no doubt that Katie Gantley will be hated passionately by my future clerks, who will find Katie set the performance bar so high that it will be difficult for ordinary mortals to achieve.

Patricia Hurt - patricia.hurt@ferc.gov - 703-201-3467

If you would like further information about Katie, or anything else, please do not hesitate to contact me.

Warm regards,

Patricia E. Hurt

Senior Administrative Law Judge

Federal Energy Regulatory Commission

Patricia Hurt - patricia.hurt@ferc.gov - 703-201-3467

June 25, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I write to recommend Katherine Gantley for a clerkship in your chambers. I first got to know Ms. Gantley supervising her as a legal intern in the office of then-Commissioner Rich Glick at the Federal Energy Regulatory Commission. Based on that experience—and what I have heard from the Administrative Law Judges for whom she clerked subsequently at the Commission—I can say without hesitation that she would be an excellent addition to chambers. She is careful and precise in her legal analysis and has a knack for finding the strongest evidence available to support an argument. On a personal note, she fit right in among a group of strong personalities and every member of Commissioner Glick's office enjoyed having her as part of the team.

Ms. Gantley's analysis of Commission and judicial precedent was uniformly thorough and well-reasoned. During her time in Commissioner Glick's office, I assigned her to research several significant legal questions, which required her to identify and analyze both Commission precedent and various decisions from the U.S. Courts of Appeals. In every instance, I was impressed with her ability to find all relevant precedent and correctly discern its application to the facts at hand. Her work was particularly impressive since many of the proceedings before the Commission are highly fact-intensive and require detailed knowledge on how the various segments of the energy sector function—knowledge that she did not have the outset of the internship, but that she picked up remarkably quickly during her time there. Since working in Commissioner Glick's office, she has completed a two-year clerkship with the Commission's Administrative Law Judges, which is one of the premier opportunities for any young lawyer interested in energy work. I have no doubt that her clerkship has only sharpened and further honed Ms. Gantley's skills as a lawyer.

Ms. Gantley was also creative and diligent in helping develop the material needed to support Commissioner Glick's positions. A single example is particularly instructive. While working on a dissenting opinion involving the authorization of an interstate natural gas pipeline, I asked Ms. Gantley to help develop an assessment of the pipeline's potential eminent domain impact on landowners. Far more quickly than I could have expected, she developed a creative and methodologically rigorous approach for surveying PACER to identify all the relevant eminent domain proceedings in the federal judicial districts crossed by the pipeline in question. Her analysis of those proceedings formed the basis for an argument about the timing and consequences of authorizing eminent domain—analysis that the U.S. Court of Appeals for the District of Columbia Circuit relied upon in vacating the relevant Commission orders under that Court's Allied-Signal precedent. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021). I doubt the Court reaches the same result without Ms. Gantley's efforts.

Finally, Ms. Gantley was a true pleasure to work with. Commissioner Glick's office contained strong personalities and a lot was expected of every member of the office, interns included. Ms. Gantley worked effectively with every member of the office and appeared to genuinely enjoy the challenges the work presented, even when it involved late nights and weekends. I was lucky enough to clerk in a pair of very different judicial chambers and, based on those experiences, can appreciate how important clerks' attitude and personality can be in developing a cohesive group and an enjoyable chambers environment. I have no doubt Ms. Gantley would be a first-rate addition to any such group.

Again, I recommend Ms. Gantley enthusiastically and without hesitation. If there is any additional information that I can provide, please do not hesitate to let me know. Thank you for your time.

Matthew Christiansen
General Counsel
Federal Energy Regulatory Commission

KATHRYN M. GANTLEY

880 P St NW, Apt 302, Washington, DC 20001 | (315) 409-3690 | katiegantley@gmail.com

Writing Sample

The following is one section of an initial decision that I drafted for my Administrative Law Judge (Judge) as an Attorney-Advisor in the Office of Administrative Law Judges at the Federal Energy Regulatory Commission (FERC). The initial decision is the result of a proceeding that came before my Judge on voluntary remand from the United States Court of Appeals for the District of Columbia Circuit by FERC. The proceeding concerned the Trans Alaskan Pipeline System (TAPS) Quality Bank, which was developed to compensate shippers for discrepancies between the value of the crude oil they injected into the comingled TAPS stream at Alaska's North Slope and the value of the crude oil they received at the end of the pipeline in the Port of Valdez. This proceeding specifically concerned the Quality Bank's valuation of Resid, one of nine cuts of oil produced by simple distillation. The initial decision addresses two issues: (1) whether the existing Quality Bank valuation of Resid continues to be just and reasonable and (2) if the existing Quality Bank valuation of Resid is unjust and unreasonable, whether the proposed alternative valuation methodologies are just and reasonable. The below section discusses an anomaly theory presented by one of the participants in the proceeding as evidence that the existing valuation methodology for Resid is unjust and unreasonable. I have also included the initial decision cover page and table of contents for reference. I have been authorized by my Judge to use this initial decision as a writing sample. This section has benefited from edits made by my Judge.

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179 FERC ¶ 63,013

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., and ExxonMobil Pipeline Company — Docket No. OR14-6-003

INITIAL DECISION

(Issued May 16, 2022)

APPEARANCES

Kenneth M. Minesinger, Howard L. Nelson, Michael Pusateri, Jack LeBris Erffmeyer, Rabeha S. Kamaluddin, and Angela Speight on behalf of Petro Star Inc.

Catherine M. Fischl, Matthew C. Phillips, Kenneth M. Ende, and Amy Mersol-Barg on behalf of Commission Trial Staff

Steven A. Adducci, Gregory S. Wagner, and John R. Evans on behalf of ConocoPhillips Alaska, Inc.

Lorrie M. Marcil, Gregory M. Kusel, and Daniel S. Walker on behalf of Exxon Mobil Corporation

Eugene R. Elrod, Richard H. Griffin, and Denali Kemppel on behalf of Hilcorp Alaska, LLC

Tina M. Grovier and Greg McEldowney on behalf of The Standard Oil Company

Dean H. Lefler, Amy L. Hoff, and Nicholas M. Moore on behalf of the TAPS Carriers

Robin O. Brena, Kelly M. Moghadam, Joseph S. Koury, and Andrew T. Swers on behalf of Anadarko Petroleum Corporation and Tesoro Alaska Company LLC

PATRICIA E. HURT, Presiding Administrative Law Judge

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48. Based on the foregoing analysis, I find and conclude that as the proponent of changing the existing Quality Bank methodology, Petro Star bears the burden of (1) proving by a preponderance of the evidence that the existing Quality Bank methodology has become unjust and unreasonable and (2) that the revisions it proposes to the Quality Bank methodology are just and reasonable. I further find and conclude that Petro Star can meet its burden by establishing the existence of changed circumstances or new evidence.

IV. ISSUES AND DISCUSSION

A. Whether the Existing, Commission-Adopted Quality Bank Methodology for Valuing Resid is Just and Reasonable

1. Whether the "Less-Than-A-Barrel Anomaly" Theory Demonstrates that the Current Quality Bank Methodology is Not Just and Reasonable

49. Petro Star proffers the "Less-Than-A-Barrel Anomaly" (Anomaly) theory to demonstrate that the current Quality Bank methodology is not just and reasonable. The Anomaly is "premised on the theory that the sum of the values assigned to each cut under the Quality Bank methodology should exceed (or at least equal) the real-world market price for a barrel of Alaska North Slope (ANS) crude."[117] The underlying principle of the Anomaly theory is that the value of products after processing should be more than the value of raw material before processing.[118] In short, the Anomaly theory assumes that processing must always add value or at least not decrease value. As such, the Anomaly occurs when the value of a barrel of post-distillation ANS crude, as computed by the Quality Bank methodology, is less than the market price of a barrel of ANS crude.

50. In *Petro Star Inc. v. FERC*, the D.C. Circuit agreed with Petro Star that the Commission "failed to respond meaningfully to Petro Star's argument and evidence about the less-than-a-barrel anomaly[]" and remanded the case back to the Commission to provide that response.[119]

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[117] *Petro Star*, 835 F.3d 97 at 103.

[118] *Id.* at 103. *See* Petro Star Initial Br. 10.

[119] *Petro Star*, 835 F.3d 97 at 106.

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Participant Positions

51. Petro Star posits that "products produced by the QB refinery should typically have a higher aggregate value than the raw ANS crude oil."[120] Relying on analysis by witness Nelson, Petro Star asserts that under the Quality Bank methodology, the products produced by the Quality Bank refinery do not have a higher aggregate value than the ANS crude "more than 35% of the time since 2008."[121] Based on this assertion, Petro Star argues that the "logical explanation for the Anomaly is that it occurs because the QBF undervalues Resid[.]"[122] Petro Star states that refiners ignore return on investment and fixed operating costs in running their refineries.[123] Petro Star argues that the Quality Bank methodology should do the same, eliminating the coker cost deduction for capital and operating costs.[124] Petro Star uses the Anomaly as its launching point for asserting that the Quality Bank formula is not just and reasonable, and to support the changes that Petro Star proposes to make the Quality Bank methodology just and reasonable.

52. Anadarko/Tesoro asserts that the Anomaly theory is "conceptually flawed and contrary to the record evidence."[125] Therefore, Anadarko/Tesoro argues, the Anomaly "should play no role in evaluating the reasonableness of the [Quality Bank] methodology or the valuation of Resid."[126] Anadarko/Tesoro states that the D.C. Circuit recognizes that the Anomaly was the "initial impetus" for this case, but also acknowledged that the Anomaly theory may be "oversimplified or incorrect."[127] Anadarko/Tesoro emphasizes the Commission's finding that the Anomaly theory is incorrect. Anadarko/Tesoro quotes the Commission's finding that:

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[120] Petro Star Initial Br. 10.

[121] *Id.*

[122] *Id.* 11.

[123] *Id.* 12.

[124] *Id.* 12-13.

[125] Anadarko/Tesoro Initial Br. 14.

[126] *Id.*

[127] *Id.* 14-15.

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> "Resid that has only been through simple distillation is more difficult to store or transport than the common stream because it must be heated to keep it from solidifying in storage tanks. In this way the distillation of a barrel of ANS crude into its component parts may be less valuable than a barrel prior to distillation, as the Court of Appeals theorized."[128]

53. Anadarko/Tesoro states that "over the long run, there is no [A]nomaly."[129] Anadarko/Tesoro explains that between 2004 and 2019, the sum of the prices for the nine Quality Bank cuts exceeded the price of a barrel of ANS crude by an average of $2.93 per barrel.[130] Relying on witness Graybill's testimony, Anadarko/Tesoro explains that the prices for each of the nine Quality Bank cuts "move independently based on various market forces affecting each cut" and that that "cuts do not move in lock step."[131] Therefore, Anadarko/Tesoro explains, "[i]t is impossible to say that any single cut, such as Resid, is responsible for the overall relationship between the sum of the 9 cuts and the price of ANS."[132] Anadarko/Tesoro also explains that because of the timing differences between the decision to purchase crude and the actual distillation of the nine Quality Bank cuts, comparing those Quality Bank cuts to a barrel of ANS crude in the same month has no bearing on the Quality Bank valuation of Resid.[133]

54. The Joint TAPS Shippers state that the Anomaly "has no validity as a test for either the valuation of Resid or the overall reasonableness of the current [Quality Bank methodology]."[134] The Joint TAPS Shippers explain that the Anomaly "is the result of

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[128] Anadarko/Tesoro Initial Br. 16 (citing February 2018 Remand Order, 162 FERC ¶ 61,147, at P 36).

[129] *Id.* 17 (quoting Ex. ATS-0055 REV 2 at 22).

[130] Ex. ATS-0055 REV 2 at 24; *see* Ex. ATS-0058 (TAPS QB Formula Value v. Platts Price for ANS Crude).

[131] Anadarko/Tesoro Initial Br. 18.

[132] *Id.*

[133] *Id.* 19.

[134] Joint TAPS Shippers Initial Br. 13.

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market forces operating as a knowledgeable observer would expect."[135] The Joint TAPS Shippers assert that the Anomaly incorrectly assumes that the markets for intermediate cuts and for crude move in unison. Rather, the Joint TAPS Shippers explain, while the "markets are inter-dependent, separate forces affect the prices of commodities in each market."[136] The decisions to purchase crude and to refine crude into marketable products occur at different points in time, the Joint TAPS Shippers explain. Therefore, the Joint TAPS Shippers state, decisions to purchase crude "are made with imperfect knowledge regarding market prices that intermediate cuts and refined products will fetch when sold weeks or months later."[137]

55. With respect to simple distillation adding value to ANS crude, the Joint TAPS Shippers explain that "distillation itself does not necessarily add value because the intermediate cuts resulting from distillation are traded in markets that are different from crude markets."[138] The Joint TAPS Shippers quote witness Goring to explain why the sum of the intermediate cuts can sometimes be less than ANS crude. Goring explains that, once the crude is distilled, it moves from the oil market to the intermediate cut market, and those markets are independently traded based on supply and demand. Thus, Goring explains, "if some of those nine cuts turns out to be very undesirable at a given time, then they may drag down the price such that the sum of the products would be less than the cost of the crude."[139] The Joint TAPS Shippers explain that the "QB's simple distillation model does not replicate a real-world complex refinery" and "ascribes values to a mix of intermediate and finished products."[140] Accordingly, the QBA calculates values for the nine cuts after simple distillation; some of these nine cuts are finished products, and some are "intermediate and not final products."[141] The Joint TAPS Shippers assert that the "[Quality Bank methodology] was not intended to, and does not,

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[135] Joint TAPS Shippers Initial Br. 13.

[136] *Id.* 15.

[137] Joint TAPS Shippers Initial Br. 15.

[138] *Id.* 15.

[139] *Id.* 15-16 (citing Tr. 5259:16-5260:5 (Goring)).

[140] *Id.* 16.

[141] *Id.* 16.

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replicate the gross product worth to a complex refinery of finished products made from ANS crude."[142]

56. Finally, the Joint TAPS Shippers posit that Petro Star witness Nelson's assertion that the Anomaly is consistent with marginal economics is incorrect. The Joint TAPS Shippers explain that a "properly-calculated variable refinery margin shows that the QB Base Refinery's variable margin exceeded break-even in 85 percent of the months between 2014 and 2019, and was below break-even in less than two percent of the months in that period—months during which there was extreme economic stress."[143] The Joint TAPS Shippers assert that implementing Petro Star's proposed changes would not eliminate the Anomaly and explain that "allegedly 'anomalous' months simply reflect variations in market forces that reduce the market values of intermediate cuts relative to crude oil."[144]

57. The State of Alaska maintains that because the D.C. Circuit did not validate the Anomaly theory and acknowledged that the theory may be "oversimplified or incorrect[,]" Petro Star must prove that the Anomaly exists, that the premise of the Anomaly is correct, and that the Anomaly proves there is a flaw in the Quality Bank methodology. The State of Alaska argues that Petro Star has failed to demonstrate both that the Anomaly exists, and that the Anomaly demonstrates that the existing Quality Bank methodology is unjust and unreasonable. The State of Alaska asserts that Petro Star witness Nelson's Anomaly analysis compared only the value of part of a barrel of raw ANS crude to part of the products produced from that barrel, not the whole barrel of ANS crude to all the products produced after distillation. The State of Alaska argues that such "critical omissions render his analysis meaningless."[145] The State of Alaska explains that Nelson, in his Anomaly analysis, calculated the value of a barrel of ANS crude by using Platts weekly average ANS prices and averaging the prices from each month. This, the State of Alaska asserts, represents only the prices for "a fraction of ANS crude that is produced on the North Slope."[146] The State of Alaska states that the

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[142] Joint TAPS Shippers Initial Br. 17.

[143] *Id.* 18 (citing Ex. CP-0001 at 115:5-117:4).

[144] Joint TAPS Shippers Initial Br. 19-20 (internal quotations omitted).

[145] State of Alaska Initial Br. 5.

[146] *Id.* 5-6 (describing the proper analysis to calculate the value of ANS crude: "First, he would have had to investigate the other bases upon which ANS crude oil is sold, the percentage of ANS crude oil sold on each of those bases, and the prices for

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Anomaly analysis done by Nelson similarly values only part of the products produced by ANS crude by aggregating only the spot market prices for the eight other Quality Bank cuts, rather than investigating long-term contract prices for the other Quality Bank cuts.[147] For these reasons, the State of Alaska argues, the Anomaly theory is wholly "unreliable and proves nothing."[148] The State of Alaska states that "Petro Star's failure to prove the existence of the Anomaly is fatal to all of its proposals to change the Commission approved Quality Bank methodology."[149] As such, the State of Alaska requests that the Commission reject Petro Star's proposals.

58. The TAPS Carriers do not take a position on this issue.[150]

59. Trial Staff asserts that the Anomaly fails to demonstrate that the Quality Bank methodology is not just and reasonable. Trial Staff reiterates the Commission's finding that "the distillation of a barrel of ANS crude into its component parts may be less valuable than a barrel prior to distillation[]" because the Quality Bank methodology "ascribes values to a mix of intermediate and finished products resulting from simple atmospheric distillation and does not reflect the downstream units and costs of a real-world, complex refinery."[151] Trial Staff states that the Anomaly demonstrates that intermediate products, including Resid, are merely subject to further processing. Trial Staff asserts that the "Anomaly theory reflects a fundamental misunderstanding of crude economics."[152] Trial Staff explains that the Anomaly theory is irrelevant to the valuation of Resid—in addition to other intermediate products—because the theory assumes that a return on investment must be reflected in feedstock prices. However, Trial Staff explains, "marginal economics drive short-term operating decisions for refineries, meaning a refiner will buy and process feedstocks so long as the last barrel run generates

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those sales. He also would have needed to determine the percentage of ANS crude oil sold on a spot basis. With that information he would have been able to calculate the weighted average value of ANS crude oil.").

[147] State of Alaska Initial Br. 7 (citing Tr. 2129:24-2130:2 (Nelson)).

[148] *Id.* 13.

[149] *Id.* 13.

[150] TAPS Carriers Initial Br. 12.

[151] Trial Staff Initial Br. 11 (internal quotations omitted).

[152] *Id.* 12.

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incremental positive cash flow without regard for return on investment."[153] In addition, Trial Staff asserts that Petro Star's focus on the price of intermediate products as compared to ANS crude is misplaced. Trial Staff explains that complex refineries earn a higher margin "on the full upgrade of crude or intermediate cuts to finished products."[154] And when West Coast refiners convert intermediate Quality Bank cuts to finished products, Trial Staff claims that the Anomaly "essentially disappears[.]"[155] Finally, Trial Staff argues that the Anomaly is a "result of short-term market conditions and does not reflect longer-term market conditions."[156] Trial Staff explains that, to the extent the Commission finds the Anomaly relevant, "over the long run, the average value of the nine distillation cuts exceeds the average value of a barrel of ANS crude oil."[157]

Analysis

60. The Anomaly theory does not demonstrate that the current Quality Bank methodology is not just and reasonable. The Anomaly theory is flawed for the following reasons: (1) the Anomaly theory bears no relevance to the accuracy of the Quality Bank methodology because it compares the values of the sum of the nine Quality Bank cuts—six finished products and three intermediate products—to a barrel of ANS crude oil; (2) by its nature, the Anomaly theory ignores the realities of market and timing differences between the nine Quality Bank cuts; (3) the proponents of the Anomaly theory misunderstand marginal economics; and (4) the effect of the Anomaly becomes *de minimis* when analyzed over the long run. These flaws are described in more detail below.

61. First, the fact that a Quality Bank methodology is even necessary to value the three intermediate Quality Bank cuts makes obvious that these cuts (Resid, Heavy Distillate, and Light Distillate) are not final products because they have no published market prices. Thus, adding together the values of the three unfinished products with the values of the six finished products, for which there are market prices, will never amount

[153] Trial Staff Initial Br. 11.

[154] *Id.* 13.

[155] *Id.* (citing Ex. HA-0001 at 23:14-16).

[156] *Id*.

[157] Trial Staff Initial Br. 13-14 (citing Ex. ATS-0055 at 24:1-28:12).

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to a logical equivalent of a barrel of ANS crude.[158] Only the sum of all *final* products of a barrel of ANS crude could hold the potential of comparison to ANS crude, but that is not the purpose or intent of the Quality Bank methodology.[159]

62. Second, simple distillation does not necessarily add value to each Quality Bank cut.[160] By distilling ANS crude, the owner of the resulting products moves from the crude oil market to the intermediate cut market.[161] Such markets are traded independently from the crude oil market, based on supply and demand of each individual cut.[162] Thus, depending on the economy, some of those cuts may be more or less desirable at any given time. For example, processing Resid into marketable products is a costly endeavor. The cost of transportation is one of the costs that goes into processing Resid into marketable products. Because Resid is a highly viscous material, it can only be transported by being mixed with another liquid product (for transport in pipelines or trucks) or by heating it at a high temperature to achieve a liquid state. The Anomaly theory, by attempting to equate the values of finished products and intermediate cuts, merely demonstrates that the intermediate products, such as Resid, are subject to further processing.[163]

63. By failing to acknowledge the realities of the differences between the Quality Bank cuts after simple distillation, Petro Star also fails to acknowledge the realities of the differences in timing.[164] The decision to purchase crude is made with imperfect

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[158] In other words, Petro Star attempts to add apples and oranges to equal bananas.

[159] Ex. CP-0001 at 108:5-9; Ex. HA-0001 REV at 37:20-38:4.

[160] *See infra* Figure 3.

[161] Tr. 5259:16-5260:5 (Goring).

[162] Tr. 5259:16-5260:5 (Goring); Ex. ATS-0055 REV 2 at 26:4-5.

[163] February 2018 Remand Order, 162 FERC ¶ 61,147, at P 35.

[164] Petro Star attempts to liken the worth of ANS crude after processing to the worth of flour to a baker, asserting that "flour is far more valuable to a baker than raw, unmilled wheat harvested from a field." Petro Star's metaphor is a gross oversimplification, comparing a single-product process to the complex real world of oil refining. Resid is a byproduct of distilling ANS crude for the more valuable cuts, such as naphtha and light straight run. Processing ANS crude creates new oil products which enter different markets and can no longer be put back together to equal the raw,

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knowledge of market prices that the final products and intermediate cuts will fetch after further processing when sold in those markets weeks or months down the road.[165]

64. Third, Petro Star states that refiners ignore return on investment and fixed operating costs in running their refineries.[166] Petro Star argues that the Quality Bank methodology should do the same, eliminating the coker cost deduction for capital and operating costs.[167] However, Petro Star witness Nelson's Anomaly theory misunderstands marginal economics. Refiners use marginal economics for short-term operating decisions. The decision to purchase feedstock is made on a long-term basis, but the decision of how to process that feedstock is based on short term considerations, such as economic conditions and demand at the time of processing.[168] For example, a refiner will buy and process feedstocks so long as the last barrel to run through the refinery generates an incremental positive cash flow. In the short-term, refiners disregard whether the feedstocks will produce a return on investment.[169] Therefore, Petro Star's insistence upon valuing Resid based on its marginal production cost inaccurately employs marginal economics because refiners do not consider fixed operating costs and capital recovery in their short-term operating decisions.[170] As explained by Hilcorp witness Goring, the Quality Bank methodology seeks to value Resid by the average cost of producing each barrel of Resid over the long term, factoring in fixed and variable operating and capital costs.[171]

65. Fourth, as Anadarko/Tesoro witness Graybill ascertained, the Anomaly is *de minimis* when the value of ANS crude and the value of the nine Quality Bank cuts are

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unprocessed whole. Thus, Petro Star, by likening all the Quality Bank cuts to flour, oversimplifies and distorts the reality of what occurs when processing ANS crude and valuing the resulting Quality Bank cuts. Petro Star Initial Br. 10.

[165] Ex. ATS-0055 REV 2 at 27:7-21; Ex. HA-0001 REV at 12:21-13:2.

[166] Petro Star Initial Br. 12.

[167] Petro Star Initial Br. 12-13.

[168] Ex. HA-0001 REV at 22:3-23:11.

[169] *Id.* at 22:3-23:22.

[170] *Id*. *See also* Ex. CP-0001 at 113:4-114:11.

[171] Tr. 5111:1-5112:2 (Goring).

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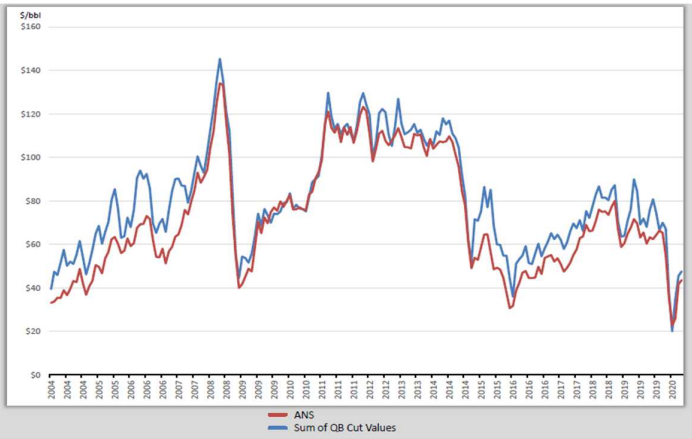
analyzed side-by-side over the long run.[172] The Anomaly does not reflect long-term market conditions and, when analyzed over the long run, the average value of the nine Quality Bank cuts exceeds the average value of a barrel of ANS crude.[173] As the Joint TAPS Shippers explain, "a properly-calculated variable refinery margin shows that the QB Base Refinery's variable margin exceeded break-even in 85 percent of the months between 2014 and 2019, and was below break-even in less than two percent of the months in that period—months during which there was extreme economic stress."[174] In fact, the Quality Bank refinery has been above breakeven since July 2014.[175] Hilcorp witness Goring demonstrated the comparison between the value of the Quality Bank cuts and ANS crude over time (Figure 2).

Figure 2. Approximation of "Anomaly" Plot when ANS is Processed in West Coast High-Complexity Refinery[176]



[172] Ex. ATS-0055 REV 2 at 24; *see* Ex. ATS-0058 (TAPS QB Formula Value v. Platts Price for ANS Crude).

[173] Ex. S-0001 REV at 149:13-150:5 (7 of 70 months); Ex. CP-0001 at 115:5-116:10. *See also* Ex. ATS-0055 at 24:1-28:17; Joint TAPS Shippers Initial Br. 18. Although these experts performed slightly different analyses, they agree that the average value of the nine cuts exceeds the value of ANS crude over the long term.

[174] Joint Taps Initial Br. 18 (citing Ex. CP-0001 at 115:5-117:4).

[175] Ex. CP-0001 at 115:5-116:10.

[176] Ex. HA-0008 REV.

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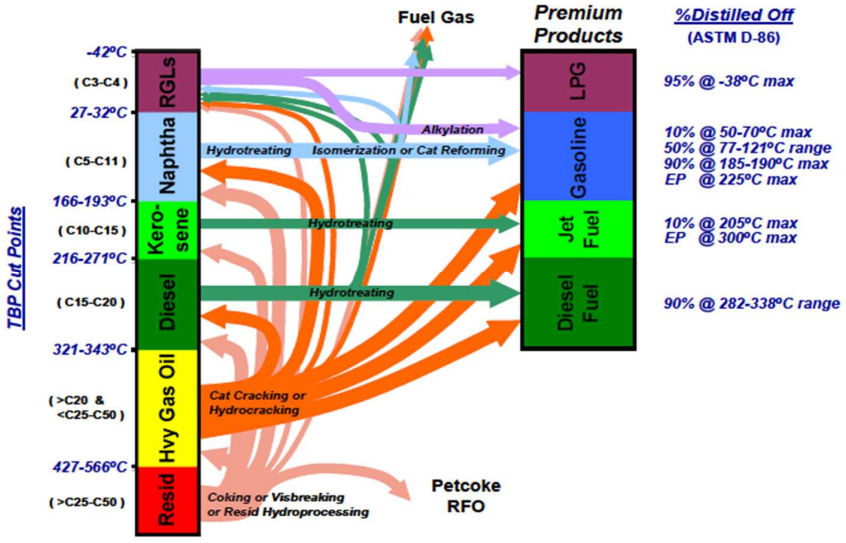
66. Goring explains that the typical complex West Coast refinery would convert about 97% of the feedstock input into finished products.[177] Goring explains that the Anomaly "essentially disappears when ANS crude is processed in a high-complexity refinery and converted to finished products, even during the worst of the 2008-2009 economic recession."[178] Goring testifies that this makes sense because all Quality Bank "intermediate cuts are further processed to make finished products, which yield higher prices as gasoline, jet fuel and diesel fuel."[179] Figure 3 displays how the Quality Bank Resid cut is further processed into eventual end products such as diesel fuel, jet fuel, and gasoline.

Figure 3.[180]



67. Some of the distillation cuts, such as gasoline, jet fuel, diesel, kerosene, and light gas oil, among others, "only require slight to moderate upgrading to be used as fuels."[181]

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[177] Ex. HA-0001 REV at 32:19-21.

[178] Ex. HA-0001 REV at 33:3-5; Ex. HA-0008 REV.

[179] Ex. HA-0001 REV at 33:5-7.

[180] Ex. S-0028 at 2.

[181] *Id.*

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Unlike these cuts, a large portion of the barrel of crude "is heavier than premium refined products" and therefore must be "transformed via cracking processes in order to maximize the production of premium products, primarily transportation fuels."[182] Therefore, when comparing the value of the Quality Bank cuts to the value of ANS crude for one month out of a year as a static picture in time, there may be an anomalous month or two, but comparing the value of the Quality Bank cuts to the value of ANS crude *over a number of years* renders the Anomaly *de minimis*. This is true because Resid itself is not a final product and cannot be compared on the same level as the other Quality Bank cuts. Moreover, the economic forces affecting each cut in separate markets following simple distillation precludes a meaningful comparison.

68. In addition to the variance in quality of the nine Quality Bank cuts, the markets that the Quality Bank cuts enter after simple distillation are each subject to economic forces that may reduce the market values of intermediate cuts relative to crude oil.[183] For example, witness Graybill testifies that the COVID-19 pandemic in 2020 "caused drastic reductions in consumption of petroleum products, such as gasoline, diesel, and jet fuel."[184] Similarly, witness Goring highlights that during the economic recession of 2008 and 2009, the prices of intermediate cuts plummeted, and did so to a greater extent than the price of crude oil, "with the result that the price relationship between ANS crude and the aggregate of the intermediate cuts inverted—that is, the ANS crude price became higher than its intermediate-cut prices."[185] Anomalous months in these periods are just that—an anomaly—when viewed in the aggregate over a period of years from January 2014 to December 2019.[186]

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[182] Ex. S-0028 at 2.

[183] Ex. CP-0001 at 106:1-8. *See also* Ex. ATS-0055 REV 2 at 27:3-6.

[184] Ex. ATS-0055 REV 2 at 28:9-10. The United States and the rest of the world faced a world-wide pandemic that began in March 2020. As of this writing, pandemic conditions remain in effect.

[185] Ex. HA-0001 REV at 18:17-20.

[186] *See* Ex. ATS-0055 at 24:3-10 (explaining that between "January 2014 through December 2019…, which roughly corresponds to the update period for this case prescribed by the Commission in the 2020 Hearing Order, the amount by which the nine cuts exceeds the ANS barrel price grows to $3.92 per barrel" as compared to $2.93 per barrel between 2004 and 2019).

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69. Finally, Petro Star argued to the D.C. Circuit that the Quality Bank "results in a systematic undervaluation" of Resid.[187] If that were the case, one would expect the Anomaly to appear every year. It does not.[188] In fact, it only occurred in 7 out of 70 months between March 2014 and the end of 2019.[189] Those anomalous months indicate no trend of consistent undervaluation. Moreover, Petro Star offers no evidence that the observed anomalous months were caused by undervalued Resid.[190] As evidenced by the Figure 4, the relative yield and value of each Quality Bank cut per barrel of ANS crude oil alone demonstrates that the likelihood of Resid being the single cut causing the Anomaly is low. There are three Quality Bank cuts with higher yield percentages and a weighted volume price per barrel within the ANS crude oil stream (Heavy Distillate, Naphtha, and Vacuum Gas Oil). And another cut, Light Distillate, is on par with Resid itself when reviewing the two cuts' weighted values.

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[187] *Petro Star*, 835 F.3d at 104.

[188] *See* ATS-0055 at 24.

[189] Ex. S-0001 REV at 149:13-150:5. Often, these anomalous months followed economic shocks. Over the long run, the average value of the Quality Bank cuts exceeds the average value of a barrel of ANS crude. *See* Ex. ATS-0055 at 24:1-28:12.

[190] Trial Staff Initial Br. 11-12 (stating that "Nelson concedes, however, that the Anomaly would exist even if all the Petro Star proposed changes to the current Resid Equation are made") (internal quotations omitted); Ex. PS-0078 at 34:17-19; Ex. PS-0148 at 109:12-13; Anadarko/Tesoro Initial Br. 18-20 (stating that for the months that Nelson labels as anomalies, Resid—only one of the nine Quality Bank cuts—could not have been the cause of such and, in fact, the price of Resid "relative to the ANS prices moved in the opposite direction to the creation or elimination of a purported 'anomaly'" in seven months); Ex. ATS-0061; Ex. ATS-0055 at 26; Tr. 2667:13-14 (Nelson) (acknowledging that "[i]t's possible that other cuts are contributing to the anomaly"); Tr. 2662:4-17 (Nelson) (acknowledging that 23 out of the 59 anomalies would remain even after making all of Petro Star's proposed changes to the Quality Bank valuation of Resid); Joint TAPS Shippers Initial Br. 19-20 (stating that Nelson admitted to not having investigated whether the other Quality Bank cuts were responsible for anomalies and that dips in price could be due to "some mistake" or "variations in the market"); Tr. 2718:17-2719:12 (Nelson); Tr. 2720:1-4 (Nelson); Ex. PS-0181 at 1 (showing Naphtha as the cut most highly-related to the anomaly, followed by Resid, and Gas Oil).

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Figure 4.[191]

Relative Yield and Value of Quality Bank Cuts

Number of QB Cuts	QB Cuts	Dec. 2019 Yield Data Ex. PS-0001 at 11 (a)	AVG Price 1/31/2008 - 11/30/2020 Ex. CP-0112 at 20-23 (b)	Yield - Volume Weighted Value (a*b)
1	Propane	0.50%	$43.40	$0.22
2	Iso Butane	1.10%	$58.03	$0.64
3	Normal Butane	3.10%	$48.12	$1.49
4	Light Straight Run	7.40%	$58.72	$4.35
5	Naphtha	18.80%	$84.41	$15.87
6	L-Distillate	8.70%	$92.03	$8.01
7	H-Distillate	18.00%	$89.02	$16.02
8	Vacuum Gas Oil	26.70%	$88.34	$23.59
9	Resid	15.70%	$51.18	$8.04
		100.00%		
	$66.29 ANS Spot Price from 12/2019 Yield Data from 12/2019		$76.78 ANS Average Spot Price Average Spot Prices from Ex. CP-0112 at 20-23.	$78.21 Weighted Average Value of QB Cuts

70. Figure 4 uses a data set inclusive of both of the economic downturns frequently mentioned as a probable cause of the Anomaly. However, the resulting averages in the data demonstrate the same conclusion that Anadarko/Tesoro and Trial Staff reach: over time, the Anomaly is diminished and, on average, it disappears.[192] The weighted (yield) average of the value of the cuts is greater than the spot price of a given representative month (September 2019) *and* the average of all the ANS crude oil spot prices over the

[191] Ex. PS-0001 at 11; Ex. CP-0112 at 20-23. Using a singular month for yields is consistent with the record evidence that ANS yields have not fluctuated much outside an acceptable range. Ex. ATS-0081 at 9-13; ATS-0082; S-0001 at 54; ATS-0055 REV 2 at 22; CP-0112 at 20-23; CP-0001 at 125-133.

[192] Ex. PS-0001 at 11; CP-0112 at 20-23; Ex. S-0001 REV at 150:1-5; Ex. ATS-0055 REV 2 at 22.

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expanse of the data set used.[193] These results lead me to conclude that over time, the Anomaly is *de minimus*.

71. However, as described *supra*, there is evidence of correlation between economic conditions and the anomalous months. Specifically, the economic recession of 2008 and 2009, which caused the prices of intermediate cuts to plummet, resulted in the inversion of the "price relationship between ANS crude and the aggregate of the intermediate cuts." In other words, due to the economic forces at play during that time, "the ANS crude price became higher than its intermediate-cut prices."[194]

72. The State of Alaska's argument about the partial barrel of ANS crude is not persuasive. Although the State of Alaska makes good points about ANS crude oil being sold pursuant to long term contracts or in local markets, ultimately those facts are irrelevant to the functioning of the Quality Bank. The State of Alaska posits that Nelson's anomaly theory mistakenly compares a partial barrel of finished and intermediate products to a full barrel of ANS crude oil. However, the Quality Bank methodology is not based on the physical volumes of barrels. Rather, the Quality Bank calculations are based on samples drawn at the beginning of the process and at the end. Values for the finished and intermediate cuts are then extrapolated from these samples. Another way to conceptualize the process is that the Quality Bank calculations are conducted inside the pipeline, before a "barrel" is ever filled. Thus, comparing spot prices of ANS crude oil to spot prices of the finished cuts is a logical comparison, but comparative volumes along the TAPS system with its various comingled stream variances is not.

Conclusion

73. Petro Star identified a handful of anomalous months to develop its Anomaly theory, sufficient to warrant further investigation in the eyes of the D.C. Circuit and the Commission. That investigation has been done here. My conclusion is that, when the value of a barrel of ANS crude oil compared to the value of the Quality Bank aggregate cuts is analyzed over the long-term, the effect of the anomalous months becomes *de minimis*. Further, Petro Star failed to prove a causal relationship between the value of Resid and the Anomaly. Petro Star's Anomaly theory is based on an oversimplification of multiple complex markets.[195] Petro Star's assertions are based on pure conjecture,

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[193] Ex. PS-0001 at 11; CP-0112 at 20-23.

[194] Ex. HA-0001 REV at 18:17-20.

[195] *See Petro Star*, 835 F.3d at 105 ("Of course, Petro Star's theory concerning the

without actual supporting evidence.[196] For these reasons and the flaws discussed *supra*, Petro Star's Anomaly theory does not prove that the current Quality Bank methodology is unjust and unreasonable, nor does Petro Star carry its burden to show a causal relationship between the anomalous months and the calculated value of Resid.

2. Whether the Existing Coker Cost Deduction (Based on a Year 2000 value of Coking Costs subsequently escalated at the NFI Index) Should be Separated into Component Values of Coker Capital Cost Adjustment per Barrel ($/Bbl), Coker Variable Operating Cost Adjustment per Barrel ($/Bbl), and Coker Fixed Operating Cost Adjustment per Barrel ($/Bbl), with Separate Periodic Adjustment Mechanisms Specified for Each Component.[197]

74. The Quality Bank methodology calculates the value of Resid by subtracting from the before-cost value of coker products, the coking costs multiplied by the NFI. This section examines the second part of the equation, the coking costs, and the changes that Petro Star proposes be made to the coking costs.

Participant Positions

75. Petro Star states that the coker cost deduction includes three costs: capital costs, variable operating costs, and fixed operating costs.[198] Petro Star contends that in order to better reflect the changes over time that each category of cost is subject to, each cost category should be separated out and escalated by different measures. Petro Star avers that capital costs should be annually adjusted by the Duff & Phelps weighted average cost

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anomaly assumes that the distillation process adds enough value such that the composite value of the nine Quality Bank cuts must always exceed the price of a barrel of ANS crude oil. That premise may be oversimplified or incorrect.").

[196] *See* Trial Staff Initial Br. 11-12; Ex. PS-0078 at 34:17-19; Ex. PS-0148 at 109:12-13; Anadarko/Tesoro Initial Br. 18-20; Ex. ATS-0061; Ex. ATS-0055 at 26; Tr. 2667:13-14 (Nelson); Tr. 2662:4-17 (Nelson); Joint TAPS Shippers Initial Br. 19-20; Tr. 2718:17-2719:12 (Nelson); Tr. 2720:1-4 (Nelson); Ex. PS-0181 at 1.

[197] Variable Operating Costs are discussed in section IV.d.5, *infra*.

[198] Petro Star Initial Br. 13.

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Date of JD/LLB	**May 20, 2024**
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Journal(s)	**Yale Journal on Regulation**
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Moot Court Name(s)	**Morris Tyler Moot Court of Appeals**

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June 23, 2023

The Honorable Morgan Christen
United States Court of Appeals for the Ninth Circuit
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Dear Judge Christen:

I am a rising third-year student at Yale Law School and am applying to clerk in your chambers for the 2024 term or any term thereafter. I am interested in clerking for you because of your background as a state court jurist.

Growing up witnessing both sides of the legal system, I understand the importance of the rule of law. My father was an officer with the Los Angeles Police Department until he passed when I was six. At the same time, I was raised by a single immigrant mother who was barred from completing high school. I plan to dedicate my career to protecting the civil liberties and rights that were denied in my mother's home country and are essential to upholding a just legal system.

I want to clerk because I am interested in litigating in appellate and trial courts. Before law school, I interned at the Supreme Court of California and then was a full-time paralegal at the U.S. Attorney's Office for the Southern District of New York in the Complex Fraud and Cybercrime Unit. I enjoyed both the complexity of appellate advocacy as well as the energy of the courtroom during the three jury trials I assisted.

In law school, I trained my legal writing and research capabilities through extensive clinical work, coursework, and journal leadership. In Yale's Supreme Court Advocacy Clinic, I learned how doctrinal ambiguities are resolved through drafting one amicus brief in *Ohio Adjutant General's Department v. Federal Labor Relations Authority* and two certiorari petitions in *Bentley v. United States* and *Gonzalez-Rivas v. Garland*. As a member of the Policing, Law, and Policy Clinic, I wrote a white paper on civil diversion programs and am working on a fifty-state survey on the right to safety. As an Executive Board member of the *Yale Journal on Regulation*, I evaluated scholarship and edited complex corporate and administrative law pieces for publication. Along with being Chair of the Asian Pacific American Law Students Association, my academic commitments have taught me how to work collaboratively with others and meet rigorous deadlines. These experiences have prepared me to substantively contribute to your chambers.

I am excited by the opportunity to clerk for you and grapple with important adjudicatory matters. My resume, list of recommenders and references, writing sample, and transcript are enclosed. Professors Amy Chua, William Eskridge, Tracey Meares, Judith Resnik, and Kate Stith have submitted letters of recommendation on my behalf and are happy to speak with you about my qualifications. Thank you for your consideration.

Very Sincerely,
Caroline J. Zhai Lefever

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Yale Law School | New Haven, CT — Expected May 2024
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Activities: *Yale Journal on Regulation* (Executive Notes & Comments Editor); Asian Pacific American Law Students Association (Co-President); First Generation Professionals (Community Development Chair); OutLaws; Yale Law Women+ (Top Firms Committee); Yale Civil Rights Project (Director); Policing, Law, and Policy Clinic; Yale Police Advisory Board

University of California, Berkeley | Berkeley, CA — May 2018
Bachelor of Arts, *magna cum laude*, in Political Science (3.94 GPA)/Minor in Ethnic Studies
Honors: Phi Beta Kappa; ABA Legal Opportunity Scholarship; Cal Alumni Association Leadership Award; Truman Scholarship Semifinalist; Outstanding Student Recognition Award; Berkeley Economic Review Published Essayist

PROFESSIONAL EXPERIENCE

Williams & Connolly LLP | *Summer Associate* | Washington, DC — May 2023 - Present
Research and drafting in the appellate, First Amendment, media, white collar defense, and congressional investigations practices.

Common Justice | *Intern* | New York, NY — Aug. 2023 – Dec. 2023
Will research and write on harm reduction and restorative justice to support victim-compensation funds and prosecutorial reform.

Yale Law School | *Coker Fellow for Professor Judith Resnik* | New Haven, CT — April 2023 - Present
Prepare materials for Professor Resnik's Fall 2023 Civil Procedure course and help acclimate and teach legal writing to 1L students.

Yale Supreme Court Advocacy Clinic | *Student Director* | New Haven, CT — Aug. 2022 - Present
Research and draft petitions for certiorari, merits briefs, and amicus briefs for submission to the United States Supreme Court.

Arthur Liman Center for Public Interest Law | *Student Director* | New Haven, CT — May 2022 - Present
Edit reports on solitary confinement, compile class workshop material, and organize various events including the annual colloquium.

Nat'l Council for Incarcerated and Formerly Incarcerated Women and Girls | *Intern* | New Haven, CT — Aug. - Dec. 2022
Researched and drafted §3582 compassionate release motions on behalf of two clients. Researched and wrote memoranda on the viability of *Bivens* claims, alterations to home confinement conditions, and post-incarceration electronic monitoring.

United States Department of Justice Fraud Section | *Legal Intern* | Washington, DC — June - July 2022
Conducted legal research for proffers and drafted section publications by compiling case law on the doctrine of abatement, *Garrity* warnings, and the Federal Rules of Evidence.

United States Senate Committee on the Judiciary | *Law Clerk to Sen. Richard Blumenthal* | Washington, DC — May - June 2022
Authored questions and talking points for nominations, antitrust, criminal justice, and election integrity hearings. Drafted floor speeches for gun violence prevention, letters to agency heads regarding bankruptcy law reform, and bill co-sponsorship memoranda.

Gibson Dunn & Crutcher LLP | *SEO Law Fellow* | New York, NY — May - Aug. 2021
Worked as a 0L Summer Associate researching corporate tax law, precedent for amicus briefs, and discovery disclosure standards.

United States Attorney's Office - Southern District of New York | New York, NY — Sept. 2018 - May 2021
Intern, General Crime; Paralegal Specialist, Complex Frauds and Cybercrime Unit — June 2017 - Aug. 2017
Facilitated legal process for over fifty cybercrime, healthcare fraud, and money laundering cases. Analyzed financial records and produced U.S.C. § 3500 material and exhibits for fraud and money laundering cases. Drafted stipulations, conducted privilege reviews, and researched Second Circuit precedent to assist AUSAs during trial.

The Supreme Court of California | *Intern to the Honorable Mariano-Florentino Cuéllar* | San Francisco, CA — Jan. - May 2017
Synthesized statistics on capital punishment to monitor decision and reversal trends over the past 20 years. Drafted memoranda for case-related topics and speeches to present at weekly conference meetings. Contributed to *Beyond Weber*, 69 Stan. L. Rev. 1781 (2017).

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Gathered police settlement data to illustrate taxpayer cost of misconduct. Tracked small business growth and state legislation regulating "sharing economy" start-ups. Collected background check data on 674 start-ups to create a detailed spreadsheet.

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TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 09-JUN-2023

Record of: Caroline Jean Lefever Page: 1
Issued To: Caroline Lefever
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Date Entered: Fall 2021

Candidate for : Juris Doctor MAY-2024

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2021					
LAW	10001	Constitutional Law I: Group 8	4.00	CR	K. Stith
LAW	11001	Contracts I: Section B	4.00	CR	A. Schwartz
LAW	12001	Procedure I: Section B	4.00	CR	J. Suk
LAW	14001	Criminal Law & Admin I: Sect C	4.00	CR	J. Whitman
		Term Units 16.00	Cum Units 16.00		
Spring 2022					
LAW	21023	Cybersecurity, Cyberlaw and IR	1.00	CR	T. Wittenstein
LAW	21299	Law and Political Economy	3.00	H	A. Kaporzynski
LAW	21534	Liman Public Interest Workshop	1.00	CR	J. Carroll, S. Albertson, J. Driver, J. Resnik, G. Li
LAW	21608	Torts and Regulation	4.00	P	J. Witt
LAW	21722	StatutoryInterpretRegState	3.00	H	W. Eskridge
LAW	30246	Policing, Law,andPolicy Clinic	3.00	H	T. Meares, J. Camacho
LAW	40002	Supervised Research	1.00	CR	R. Siegel
		Term Units 16.00	Cum Units 32.00		
Sup. Research: YLW Top Firms Report					
Fall 2022					
LAW	20226	Evidence	3.00	P	P. Shechtman
LAW	20450	First Amendment	4.00	H	R. Post
LAW	30180	Supreme Court Advocacy Clinic	3.00	H	L. Greenhouse, M. Kimberly, A. Pincus, C. Rothfeld P. Hughes
LAW	30249	AdvPolicing,Law, PolicyClinic	3.00	H	T. Meares, J. Camacho
LAW	40002	Supervised Research	1.00	H	K. Stith
		Term Units 14.00	Cum Units 46.00		
Sup. Research: Federal Criminal Law.					
Spring 2023					
LAW	21124	Federal and StateCourts/FedSys	4.00	P	J. Resnik
LAW	21209	International Business Trans.	4.00	H	A. Chua
LAW	21244	Reforming the Court(s)	2.00	H	C. Rodriguez
LAW	21430	White Collar Criminal Defense	3.00	H	K. Stith, D. Zornow
LAW	30180	Supreme Court Advocacy Clinic	3.00	H	L. Greenhouse, M. Kimberly, A. Pincus, C. Rothfeld P. Hughes
Substantial Paper					
		Term Units 16.00	Cum Units 62.00		

********** END OF TRANSCRIPT **********

HEATHER ABBOTT, REGISTRAR

Official transcript only if registrar's signature, embossed university seal and date are affixed.

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW PASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

CALCENTRAL

Academic Summary

Student Profile

Name	Caroline Jean Lefever
Student ID	25106732
Academic Career	Undergrad
Level	Senior
Cumulative Units	**Total Units** 171.2 **Transfer Units** 35.2 **P/NP Total** 5 **P/NP Passed** 5
Cumulative GPA	3.941
Degree Conferred	🎓 **Bachelor of Arts** in **Political Science** Awarded: May 11, 2018 College of Letters and Science High Distinction in General Scholarship Minor in Ethnic Studies

Enrollment

Undergraduate Transfer Credit

Institution	Units	Exam Credits	Units
Pasadena City College	6.000	Advanced Placement (AP)	29.200
Totals:	**6.000**	Total Exam Units:	**29.200**

Fall 2014

Class	Title	Un.	Gr.	Pts.
ECON 1	Introduction to Economics	4.0	A	16.0
ENGLISH C77	Introduction to Environmental Studies	4.0	A-	14.8
LS C70Y	Earthquakes in Your Backyard	3.0	A+	12.0
POLSCI 5	Introduction to International Relations	4.0	A	16.0

Spring 2015

Class	Title	Un.	Gr.	Pts.
ECON 100B	Economic Analysis--Macro	4.0	A-	14.8
HISTORY 7B	Introduction to the History of the United States: The United States from Civil War to Present	4.0	A	16.0
MATH 16B	Analytic Geometry and Calculus	3.0	A	12.0
PACS 98	Directed Group Study	2.0	P	0.0
POLSCI 1	Introduction to American Politics	4.0	A+	16.0

Summer 2015

Class	Title	Un.	Gr.	Pts.
STAT W21 (Session C)	Introductory Probability and Statistics for Business	4.0	A-	14.8

Fall 2015

Class	Title	Un.	Gr.	Pts.
ECON 100A	Economic Analysis--Micro	4.0	B	12.0
ESPM 50AC	Introduction to Culture and Natural Resource Management	4.0	A+	16.0
MUSIC 27	Introduction to Western Music	4.0	A+	16.0
PHYSED 1	Physical Education Activities	0.5	A	2.0
POLSCI 171	California Politics	4.0	A	16.0
UGIS 192B	Supervised Research: Social Sciences	1.0	P	0.0

Spring 2016

Class	Title	Un.	Gr.	Pts.
ECON 136	Financial Economics	4.0	A	16.0
LEGALST 190	Seminar on Topics in Law and Society	4.0	A	16.0
MUSIC 139	Topics in Musics of the World	4.0	A	16.0
PHYSED 2	Physical Education Activities	0.5	A	2.0
POLSCI 144	American Foreign Policy Toward Asia	4.0	A	16.0
POLSCI 197	Field Study in Political Science	1.0	P	0.0
UGIS 192B	Supervised Research: Social Sciences	1.0	P	0.0

Fall 2016

Class	Title	Un.	Gr.	Pts.
ASAMST 138	Topics in Asian Popular Culture	4.0	A+	16.0
ECON 105	History of Economic Thought	4.0	A	16.0
POLSCI 3	Introduction to Empirical Analysis and Quantitative Methods	4.0	A+	16.0
POLSCI 123S	Special Topics in International Relations	4.0	A	16.0
POLSCI 181	Public Organization and Administration	4.0	A	16.0

Spring 2017

Class	Title	Un.	Gr.	Pts.
POLSCI 133	Selected Topics in Quantitative Methods	4.0	A	16.0
POLSCI 138E	The Varieties of Capitalism: Political Economic Systems of the World	4.0	A	16.0
POLSCI 191	Junior Seminar	4.0	A	16.0
POLSCI 245B	International Relations in East Asia	4.0	A	16.0

Fall 2017

Class	Title	Un.	Gr.	Pts.
ASAMST 146	Asian Americans and Education	4.0	A	16.0
ETHSTD 150	People of Mixed Racial Descent	4.0	A	16.0
POLSCI 116A	Special Topics in Political Theory	4.0	A	16.0
POLSCI 191	Junior Seminar	4.0	A	16.0

Spring 2018

Class	Title	Un.	Gr.	Pts.
ASAMST 150	Gender and Generation in Asian American Families	4.0	A	16.0
ETHSTD 174	Existential Panic in American Ethnic Literature	4.0	A	16.0
ETHSTD 176	Against the Grain: Ethnic American Art and Artists	4.0	A	16.0

June 26, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

Caroline Lefever has asked me to write a recommendation letter to be your judicial clerk. I am thrilled to take on this task. I have worked closely with Caroline over the last year, and I think she is whip-smart, diligent, a creative thinker, and a strong writer.

I met Caroline when she was a first-year student. COVID restrictions had eased enough so that students were able to have a meal with faculty provided the meal was held outside. I had dinner with Caroline and a group of her first-year classmates at a local restaurant in New Haven. She was inquisitive and cheerful. She peppered me with questions about policing after explaining her very interesting background as a Chinese immigrant whose father was a police officer who died in the line of duty when Caroline was very young. Her parentage was formative for her, but so were her experiences working in cybersecurity in a federal prosecutor's office. She had much more real-world experience in the topics of interest we shared – policing and criminal law policy – than most first-year students, but she also approached those questions with the enthusiasm and excitement of the many new law students I had met over the years.

After meeting her at that early dinner, Caroline ended up in a Clinic I co-teach on Police Policy, and she wrote to me asking if I had any projects she might be able to work on with me. As it turned out, I had agreed to serve on the National Academy of Sciences Committee on Reducing Racial Inequalities in the Criminal Justice System. One question I wanted to explore in the Academy Report was the prospect of federal support for policy innovation to reduce inequalities. Caroline carried out critically important research on the constitutional limits of federal funding, which would typically be carried out through the Edward Byrne Memorial Justice Assistance Grant (JAG) program. In addition to a masterful analysis of anti-commandeering, Caroline also put together a fantastic database of all of the Byrne/JAG grants given out in the last 10 years so that we could analyze them empirically. All of this information was heavily relied upon in the final report.

Caroline is now my research assistant on another important project – a paper I am working on as the lead article in an upcoming volume of NOMOS -- an interdisciplinary journal of law, philosophy, and political theory focusing on policing. My paper explores the legal foundations of police power, which has clear constitutional dimensions at the federal and state levels. Caroline's research has been essential. She has actually played a role in helping me to think through the process of constitutional amendments at the state level, and she did amazing work creating a database of every version of every state constitution that forms the bedrock of some of the analyses.

In my Clinic, Caroline is working on two significant projects. The first involves assisting the Council of States Government Justice Center to develop common standards for state integration of the national 988 system, which is the primary emergency call line for mental health-related crises. This project is geared toward ensuring that the 988 system serves its intended purpose of improving responses by police and other emergency responders for such calls nationwide.

Her second project involves helping develop new standards and policy guidelines for protecting people who are subjected to custodial interrogation by police, especially people with diminished cognitive capacity. Both projects find themselves at the intersection of mental health and policing, which is an area of interest Caroline has specifically pursued during her time at the Clinic. Caroline is among the Clinic's most enthusiastic participants and is a regular contributor to class discussions and clinic work. She has also volunteered to help promote the Clinic to other students, which has helped spread interest among the wider student body. It is clear that when Caroline identifies a strong interest in something, she pursues it with deliberate effort, which is why her contributions to the Clinic have been so fruitful.

Caroline is an active student at YLS and a leader. She will serve as a Coker Fellow to my colleague, Judith Resnik, which is a very high honor for a student in their third year. She is that rare gem of a student who possesses intellectual acumen, a fun-loving demeanor, and a passion for doing good in the world. I do hope that you, like me, will have the opportunity to work closely with her.

Sincerely,

Professor Tracey Meares
Walton Hale Hamilton Professor of Law
Founding Director, Justice Collaboratory
Yale Law School

Tracey Meares - tracey.meares@yale.edu - 203-432-4074

Tracey Meares - tracey.meares@yale.edu - 203-432-4074

June 26, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I understand that Caroline Lefever is applying to your chambers for a judicial clerkship. Caroline is a brilliant, unimaginably hardworking, irresistibly likeable young woman – one of my favorite students and in my opinion one of the best legal writers in the rising 3L class. I am writing to give her my highest recommendation.

By way of brief background, Caroline is the first in her family to graduate college and attend professional school. She was raised by a single mother with very limited English proficiency and grew up low-income and attending public schools. Caroline's father was a police officer for the LAPD and passed away when she was six. Her surviving family members are all uneducated, working-class Chinese immigrants. For most of her life, Caroline also looked after her older sister, who struggled with addiction and was in-and-out of prison. Despite these obstacles, Caroline always maintained an upbeat, can-do attitude and – against all odds – graduated *magna cum laude* from UC Berkeley on a full scholarship and scored a perfect 180 on the LSAT. I mention all this not only because Caroline's path to Yale Law contrasts sharply with that of her generally far more privileged classmates, but also because it speaks volumes about her character, work ethic, and unyielding grit.

Caroline was one of about 110 students in my International Business Transactions class this past Spring – and she was a joy to teach. This may sound hackneyed, but Caroline is truly passionate about, and genuinely loves legal rules, legal principles, and legal doctrine. She came to every class full of energy and eager to learn, and no one contributed more to the class discussion. I'll never forget one occasion when a guest lecturer I'd invited asked the class if anyone knew the Rule that allowed federal judges to appoint a special prosecutor. Caroline was the only one who raised her hand and got the answer correct, naming Federal Rule of Criminal Procedure Rule 42 (FRCP 42), demonstrating her tremendous work ethic and mastery of the details. Caroline's final paper for the class was outstanding – meticulously researched, powerfully argued, and beautifully written – and she received an Honors.

It's worth emphasizing that Caroline is an unusually experienced and accomplished legal writer who genuinely loves the craft of written and oral advocacy. Before law school, she spent three years at the US Attorney's Office in the Southern District of New York, assisting in over fifty complex fraud investigations and sitting three trials as a paralegal. Her experiences in the courtroom motivate her interest in grappling firsthand with procedural and substantive legal issues. Caroline is applying to clerk because she intends to litigate at both the appellate and trial levels.

On a more personal level, Caroline is delightful – effervescent, kind, generous, compassionate, perceptive, loyal, and always upbeat with a wonderful sense of humor. She is genuinely public spirited and feels passionately about advocating for the poor and working class, as well as non-English speaking immigrants who are often overlooked by the legal system. But if there's one thing that stands out about Caroline, it's her tenacity and resilience. Just a month ago – right before final exams – Caroline's aunt passed away suddenly and tragically. This was devastating for Caroline, for whom her aunt was like a second mother. To make matters worse, because there was no one else who could do it, Caroline had to fly back to California to handle all the funeral arrangements. But she pushed through, got everything done, and finished the semester strong. Caroline comes from a family of survivors and fighters and will always be a fighter. She can be counted on to be driven and reliable in even the most stressful of circumstances.

As I hope is clear, I like and respect Caroline enormously. She is not only stunningly smart, but she also has a sense of decency, gratitude, and humility that is sometimes missing in our top-performing students. I very much hope you will grant her an interview – I don't think you will be disappointed.

Please do not hesitate to contact me by email (amy.chua@yale.edu) or on my cell phone (203-668-6682) if you have any questions. I would welcome the opportunity to help in any way.

Thank you very much for your time and attention.

Sincerely yours,

Amy Chua
John M. Duff, Jr. Professor of Law
Yale Law School
amy.chua@yale.edu
(203) 432-8715

June 26, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

Caroline Lefever has applied to you for a clerkship. I have known her since her second semester at Yale Law School when she was a student in the class, Incarceration: From Construction to Abolition, that I co-taught. This past semester, Caroline was in another course, Federal and State Courts in the Federal System, and she has also worked for me as a research assistant. I can thus report that Caroline is a lively participant in discussions, reflective about legal problems and doctrine, a careful analyst of legal rules, eager to understand more of the ways law works, and deeply committed to social justice. I have enjoyed working with her; next year in the fall semester, she will be one of two Coker Fellows for the small group, Procedure, I will be teaching. I think Caroline will be an excellent law clerk, and I highly recommend her.

Caroline has helped me on a series of projects. Last spring, I wanted to learn more about a proposed federal rule (16.1) for Multidistrict Litigation (MDL) to expand the power of judges who oversee pretrial proceedings. Caroline provided an overview of the proposals, reviewed the various critiques and debates surrounding the changes, and the commentary provided by groups pressing their views of what changes were needed. It was an excellent analysis for a person in her second semester of law school.

Several other assignments Caroline did for me relate to a book, now almost complete, on the history of incarceration, the development of standards for the treatment of prisoners, and the impact of the Holocaust and the Civil Rights Movement on ideas about permissible punishments and the rights of people in detention. In this book, I excavate the history of the 1960s when incarcerated people challenged Arkansas' practice of whipping its prisoners as "discipline." After hearings including a trial that produced a record of more than 600 pages, three federal judges held in 1965 and 1967 that Arkansas could do so as long as some "safeguards" were in place; in 1968 Judge Blackmun wrote for the Eighth Circuit that whipping was "cruel and unusual punishment." On the other hand, under current Supreme Court doctrine, "paddling" children remains permissible.

After the "whipping case" (as Justice Blackmun called it), a federal judge in Arkansas was the first to hold a state's entire prison system unconstitutional. During the decade during which the case unfolded and conflicts over remedies arose, Bill Clinton was the state's attorney general and later its governor. When Winthrop Rockefeller was governor, he discussed prisons in his inauguration addresses, and I wanted to read Clinton's speeches from when he was in state government. It turned out they were hard to find. Caroline was dogged in pursuing them, and eventually, we found a compilation. I also wanted to learn what the Honorable David Bazelon, who had been a member of the accreditation committee of the American Corrections Association, said when he resigned in dismay at the closed process. Caroline helped me get to Judge Bazelon's papers at the University of Pennsylvania and his eighteen-page letter detailing the failures of information gathering, transparency, and fairness. Caroline has also done a vast amount of cite-checking and managing other students for the many chapters in this book. Again she did outstanding and careful research that included using resources like newspapers from the 1960s in Arkansas and the Howard League Journals from the 1920s.

In addition, Caroline is one of the Student Directors of the Arthur Liman Center for Public Interest Law that I helped to found decades ago. For this year's seminar, Caroline helped with class materials, including research on new cases related to gender, discrimination, and incarceration. She was also a terrific conduit to other students, letting them know of our programs. For the spring colloquium, Budgeting for Justice, at which Associate Attorney General Vanita Gupta announced the Department of Justice's revised "guidance" on fines and fees, Caroline helped with many logistics. In addition, the Liman Center has launched a website, Seeing Solitary, and Caroline did a good deal of research checking information on several states.

Caroline did all the work while doing very well in her classes and helping other professors on research projects. She has also worked on Yale's Journal on Regulation and will be its Executive Notes & Comments Editor this coming year. In short, Caroline is remarkably energetic, persistent, and engaged. She is serious about contributing to lessen injustices, and she has the ability and drive to make a difference. I hope you have the opportunity to meet her, as I think she will be an outstanding law clerk.

Sincerely,

Judith Resnik

Judith Resnik - judith.resnik@yale.edu - 203-432-1447

June 24, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am writing this letter to support the application of Caroline Zhai Lefever to be your law clerk.

Caroline is a vivacious and lively student, who is prominent in student organizations ranging from the Asian Pacific American Law Students Association, to Outlaws, to the First Generation Professionals Association. She is always full of energy and enthusiasm, brimming with good ideas and constructive forms of engagement. I quite enjoy talking with her and absorbing some of the endless good will that she is constantly dispensing.

I got to know Caroline in Fall 2022 when she was a student in my course in the First Amendment. The course is large and self-selected. I deliberately cultivate a reputation as a hard and demanding taskmaster so that only the most serious and dedicated students choose to enroll. I do not use a casebook, for example, but assign only full opinions. The reading is intense and the examination rigorous. It is an open book, 48-hour, take-home test that requires students to evaluate from the perspective of a judicial clerk two actual appellate opinions and one actual complaint. I select these three cases because they contain such hair-raisingly difficult issues of First Amendment doctrine.

Caroline performed exceedingly well on the examination, receiving a well-earned grade of honors. Her exam evidenced her capacity for analyzing even the most tangled judicial decisions and imposing a convincing form of jurisprudential order. She was clever and clear. I grade examinations blindly, so I can report with confidence that if I were a judge, and if I were so unlucky as to have these cases on my docket, I would very satisfied with Caroline's capacity to execute excellent legal work.

I highly recommend Caroline. She was an active and constructive presence in class, and I predict that she would also be in your chambers.

Sincerely,
Robert C. Post
Sterling Professor of Law

Robert Post - robert.post@yale.edu

June 24, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I write in strong support of Caroline Lefever, who has applied to be your law clerk after she graduates from Yale Law School in 2024. Caroline's mind and character are tenacious and powerful. She researches thoroughly and writes succinctly and carefully. Her energy level is high even for Yale Law students, and she always follows through. She will be a terrific law clerk.

I first met Caroline in Fall 2021 when she was a student in my small, introductory course in constitutional law. This seminar took an historical approach to understanding the structural Constitution and the role of the federal courts—the Supreme Court in particular. Many of the students in the class were initially result-oriented, which I pushed back against. Caroline was one of the first students who understood why I wanted them to dig down into text, precedent, and doctrine: I want them to be first-rate lawyers (and what else they do or are is totally up to each of them!). Caroline's exam and moot-court brief were among the best in the class.

Caroline had worked in the U.S. Attorney's Office for the Southern District of New York (where many years ago I had been an AUSA), and in our office hours I learned of her continuing interest in federal criminal law. Sensing how serious she was, I encouraged her in Spring 2022 to find others of like interest and organize a reading and discussion group which would meet weekly for two hours and get through most of the chapters of a textbook on federal criminal law that I wrote with Professor Daniel Richman of Columbia Law School. Caroline wisely assigned one person to be the moderator or teacher for each session, and that student would meet with me days in advance with any questions. At the end of the semester I met with the students and also had them take the final exam from the last time I taught the course. The four students who made it through to the end learned a lot of federal criminal law, and became good friends in the process.

A year later (in Spring 2023), Caroline was one of the research assistants I hired to help me update the textbook; she took on developments in Mail and Wire fraud, perhaps the most important set of Supreme Court interventions since the book was drafted in 2018.

I knew that Caroline would be an excellent research assistant because she had done prodigious research for me in Spring 2022 on the Armed Career Criminal Act, and specifically on Justice Alito's oft-stated concerns with the Court's "categorical approach" and "modified categorical approach" in determining whether that statute's sentencing enhancements apply. (I had been invited to present on this topic at a small conference on Justice Alito's jurisprudence.) That same term she also turned a memo I had written for the annual meeting of the American Law Institute (about the definition of consent in the MPC's sexual assault provisions) into an excellent and easy-to-understand PowerPoint.

Last term, Caroline was one of 14 students in an advanced and rigorous "cap-stone" course I teach every spring term with David Zornow, of the Skadden firm. We gave four difficult written assignments during the term, each a series of hypotheticals that grew increasingly complex and often had no "right" answers (though many "wrong" answers). Several of the prompts raised strategic and ethical issues (not necessarily addressed in the Model Rules of Professional Responsibility) as well as legal issues. In most of the prompts, the students were in the role not of exam-taker nor even of law clerk to a judge, but of an associate writing a memo for the sophisticated lead partner on the matter. Over the course of the term, most students—including Caroline—learned how to write simultaneously about law, ethics (including personal and firm reputation), and litigation strategy. Mr. Zornow and I consider our teaching a failure if the students don't learn how to integrate and relate these different concerns. Caroline caught on quickly and wrote several excellent memoranda. She was also the model class participant, asking on-point and important questions in virtually every session.

Let me end by telling you some of what I know about Caroline the person. Her mother emigrated from South Korea and does not know English well. Her father, who had been a police officer, died when Caroline was six years old. Her older sister has had run-ins with the law and with narcotics. Caroline is the bulwark not just of her immediate family but her extended family of South Korean immigrants. I don't much like the word "mentor," but I have tried to be one to Caroline, and I hope that whatever judges are lucky enough to work with her do the same.

Caroline very much enjoyed her paralegal work (including three trials) in the Southern District, and hopes to clerk at both the trial and appellate level. Her own deeply held public interest concerns are helping poor people, especially immigrants, find their way to a good place. But early in her career she wants to work hard becoming the best lawyer she can be, serving her clients and then entering government service and thereby serving the broad public interest.

It's been my good fortune to work with Caroline so closely. She has already made me proud, and would make you proud, too.

Sincerely,

Kate Stith
Lafayette S. Foster Professor of Law

Kate Stith - kate.stith@yale.edu - 203-432-4835

Yale Law School
203-432-4835
kate.stith@yale.edu

June 26, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Re: Clerkship Application of Caroline Zhai Lefever,
Yale Law School Class of 2024

Dear «Salutation» «Last_Name»:

Caroline Zhai Lefever, a rising third-year student at the Yale Law School, has asked me to write a letter in connection with her application for a clerkship with your Chambers at some point after she graduates in May 2024. I know Caroline as a student in my class introducing students to statutory interpretation, as an excellent research assistant, and as a master of legislative trivia.

I can recommend Caroline with great enthusiasm.
As you can see from her transcript and curriculum vitae, Caroline has been a serious student at the University of California, Berkeley, and now the Yale Law School. At the law school, she is now the Co-President of the Asian and Pacific American Law Students Association and has been a leader in the Yale Law Women, the First Generation Professionals, and Outlaws (our LGBTQ+ student group).

Additionally, Caroline has already enjoyed enormous real-world experience with the law. Before law school, she was an intern for then-Justice Tino Cuellar of the California Supreme Court, for the U.S. Attorney's Office for the Southern District, and for the California Attorney General's Office. In the summers since matriculating in law school, she has worked at a dizzying array of legal institutions—ranging from the Senate Judiciary Committee and the Attorney General's Office (last summer) to the tony law firms of Gibson Dunn (summer of 2021) and Williams & Connolly (this summer).

Finally, Caroline has compiled a very good grade record here at Yale Law (as she had at Berkeley). By my last count, she had 10 Honors and 3 Passes. Notably, she scored the highest mark in my Spring 2023 course on Statutory Interpretation in the Regulatory State.

The foregoing "formal" record understates the quality of what Caroline has accomplished and what she offers to you and to the larger community in her home state of California.

Caroline was the first in her family to graduate college and attend professional school. She was raised by a single immigrant mother with very limited English proficiency; her father was a police officer who passed away when Caroline was six years old. Thus, she grew up in a low-income household headed by a widowed mother. She and other family members were uneducated, working-class Chinese immigrants.

Nonetheless, Caroline flourished as a student in the public school system and starred at Berkeley and now Yale. Her career goal is to be an appellate and trial litigator. (She enjoyed immersion in the courtroom during the three trials she assisted as a paralegal at SDNY.)

Knowing about Caroline's background helps you appreciate the confidence I have in Caroline's abilities. She works really hard and is grateful for the opportunities she has enjoyed that were not possible for her parents. She is devoted to the rule of law and appreciates American democracy more than most other citizens. She is warm and generous. I love working with her.

* * *

And she is a damn good law student. So more on that.

I first met Caroline Lefever in Spring 2022, when she was a student in my course on Statutory Interpretation in the Regulatory State. This is a first-year preference course at the law school. For three credits, the course is a ton of work, because it has an ambitious set of goals: to introduce students to the constitutional and institutional framework of the modern regulatory state, as well as a thorough training in statutory interpretation and a baby introduction to administrative law. Over the years, the course has increasingly focused on doctrines, canons, and theories of statutory interpretation, typically as applied in Supreme Court or important agency cases. I hope you would agree that this agenda is essential material for modern lawyering and judging.

Caroline's Spring 2022 statutory interpretation class was intellectually and doctrinally intense. I organized the class better than I had done previously. With the aid of five teaching assistants, I was able to break out the students into smaller chat room groups on a regular basis, and in a few classes I spent hours meeting with the students myself in small groups. Generally, the students came to class ready to learn and often to debate Supreme Court analyses in cases like Sweet Home, King v. Burwell, and of course the recent debates in Bostock, Niz-Chavez, NFIB v. OSHA, Epic Systems, and other Supreme Court cases dominated by the instruments and canons associated with the new textualism—plenty of dictionaries, debates about grammar and ordinary-versus-legal meaning, Latin canons (like noscitur a sociis), and an alarming array of constitutional canons such as the major questions doctrine (aka anti-deference on steroids).

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I demanded a ridiculous amount of work from the students for a three-credit course, as we covered tons of doctrine, the leading theories of statutory interpretation and the legislative process, and in-depth discussion of leading cases—including a few short writing assignments I required of all students. An eager and well-prepared class participant, Caroline impressed me as a most serious student of statutes.

Nonetheless, the final exam was the only basis for a grade in the course. Half of the exam consisted of issue-spotting questions based on Michigan's Elliott-Larsen Civil Rights Act of 1976, as frequently amended. The ELCRA is modeled on, and most of its provisions are borrowed from, Title VII of the Civil Rights Act of 1964 (as amended). The students had the borrowed statute rule under their belts and were told that the Michigan Supreme Court majority follows the tenets of the new textualism. Hence, all the U.S. Supreme Court methodological rules and practices were relevant, as was Title VII case law sometimes.

My questions covered the map of statutory doctrine. The students had to grapple with word meaning, statutory structure, the interaction of different statutory schemes, agency deference or anti-deference, constitutional avoidance, and so forth. This was a very hard, demanding exam.
Caroline aced the nine issue-spotters in Question 1. Question 2 was a legislative history exercise the students brought with them (500-word limit on their answer), and Question 3 was a 1000-word essay that the students also brough with them to the exam. Overall, Caroline's raw score was 95 points out of 100—the highest raw score in a very competitive class (it was virtually impossible under the time pressure to score 100 points, and no one ever comes close in this class). I gave her an Honors for Statutory Interpretation in the Regulatory State only because the Registrar would not let me give a higher grade.

By the way, in addition to securing the highest raw score on the exam, Caroline had the distinction of being a key player on the winning team in "Statutory Jeopardy" that closed the class in Spring 2022 (and again last year). So she knows her statutory trivia, just as she knows how to interpret statutes! (Pop quiz. For Final Jeopardy this year, the Answer was: This Illinois Republican is the longest serving GOP Speaker of the House. See if your current clerks know the Question? No fair using Chat GPT.)

* * *

Based on her performance on the exam, I asked Caroline to be my research assistant last summer and for Fall 2022. Because she was gainly employed with law firm jobs last summer, Caroline was (like others I have retained) only able to work 5-10 hours most weeks. Yet she accomplished a lot:

■ Cite-checking, proofing, and adding new sources to my co-authored article, "Textualism's Defining Moment," to be published in the Columbia Law Review.
■ Impressive research for the theory chapter of the new edition of my co-authored casebook on Sexuality, Gender and the Law. Caroline also proofread and edited that and several other chapters in the casebook.
■ Research memo on relevant Supreme Court cases that appeared in the APA's legislative history. Added citations from the ABA and Attorney General's Committee Final Report supporting the idea that the APA envisioned limited judicial review of agency decisions. Coordinated with UVA's Law Library to obtain Carl MacFarland's papers on the passage of the APA and helped compile other legislative history materials like Senate committee reports and Roscoe Pound's speeches. This was essential work for my co-authored article "The APA as a Super-Statute," to be published as part of an APA Symposium by the Notre Dame Law Review.

For every project, Caroline was careful to understand what I wanted her to do and what format would be easy for me to use! Accordingly, she worked with another student to create a Sharepoint and uploaded relevant documents and quotations there. Caroline was an excellent research assistant: she turned up valuable history materials and current scholarship, especially for my APA article; her work was always on time, and it was well-written.
Her performance in my class, as a research assistant, and as a colleague provides strong evidence that Caroline Lefever is a learned student of the law, a dedicated professional, an outstanding team player, and a delightful person to work with. I cannot praise her enough.

This applicant offers no downsides for the clerkship position and a lot of upsides.

Hence, I am most enthusiastic in recommending Caroline Lefever for a clerkship.

If I can be of further assistance, please email me or call my cell, 917 991 5914.

Very truly yours,

William N. Eskridge, Jr.
John A. Garver Professor of Jurisprudence Yale Law School

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WRITING SAMPLE

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The attached writing sample is an excerpt from a brief written for my Constitutional Law class. It is based on then-pending Supreme Court case *Carson* v. *Makin*, No. 20-1088. I was not permitted to rely on materials submitted to the Court when writing the brief. This excerpt includes only portions written and edited by me.

Carson v. *Makin* involves an appeal of a First Circuit decision upholding a Maine statute that excluded religious private schools from a state-run tuition voucher program under the First Amendment. The question presented to the Supreme Court is:

> Whether a State violates the Free Exercise Clause or the Establishment Clause of the United States Constitution by prohibiting students who participate in an otherwise generally available student-aid program from using their aid to attend schools with religious instruction.

My team was randomly assigned to write on behalf of the respondent, A. Pender Makin, Maine's Commissioner of Education who defended Maine's tuition program.

This writing sample addresses the respondent's Free Exercise defense, arguing that Maine's exclusion of religious schools is not discriminatory based on religious status and is consistent with precedent permitting use-based distinctions in government funding.

QUESTION PRESENTED

Whether the Free Exercise Clause of the United States Constitution requires Maine to subsidize sectarian schools in a tuition program meant to provide public education for students who live in School Administrative Units (SAUs) that neither operate secondary public schools nor contract for school privileges.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Title 20-A, § 2951(2) of Maine's Revised Statutes (Me. Rev. Stat. Ann.) provides that "A private school may be approved for the receipt of public funds for tuition purposes only if it...[i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."

STATEMENT OF FACTS

Under Maine's constitution, the state legislature requires "towns to make suitable provision, at their own expense, for the support and maintenance of public schools." Me. Const. art. VIII, Pt. 1, § 1. This constitutional requirement is reiterated in Me. Rev. Stat. Ann., Tit. 20-A, § 2(1), which states "[i]t is the intent of the Legislature that every person within the age limitations prescribed by state statutes shall be provided an opportunity to receive the benefits of a free public

education." J.A. 69. To bring this mission to fruition, Maine has tasked individual School Administrative Units (SAUs) with managing its public school system. J.A. 70.

Approximately 143 out of Maine's 260 SAUs do not operate secondary schools. J.A. 70. To provide for secondary education in SAUs lacking public schools, Maine passed a statute allowing SAUs to contract with established public schools or approved private schools in nearby districts; or pay the tuition at the public school or the approved private school of the parent's choice. Under Me. Rev. Stat. Ann., Tit. 20-A, § 5204(4), any SAU "that neither maintains a secondary school nor contracts for secondary school privileges pursuant to chapter 115 shall pay the tuition, in accordance with chapter 219, at the public school or the approved private school of the parent's choice at which the student is accepted." J.A. 70. This means, in situations where SAUs do not maintain secondary schools, public funds are paid directly to other public schools or approved private schools.

To qualify as an "approved private school" eligible for public tuition assistance, Maine requires that the private school be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Rev. Stat. Ann. Tit. 20-A, § 2951(2). This nonsectarian requirement was codified after Maine's Attorney General released guidance in January 1980 admonishing that paying tuition for students who attend sectarian schools violated the Establishment Clause. J.A. 35, 99-100.

Bangor Christian School (BCS) and Temple Academy are both sectarian schools that Petitioners seek tuition assistance to attend. J.A. 79-80, 90. Both institutions significantly intertwine academic and religious instruction in their curricula and there is also evidence that they discriminate against non-Christian religions in their teaching. J.A. 85, 92, 88, 94. Both schools refuse to hire non-Christian or LGBTQ faculty and do not accept LGBTQ students. J.A. 85, 89, 95-98. Neither BCS nor Temple Academy has indicated that they would accept tuition funds from Maine if the payments were conditioned on their schools no longer being able to exclude LGBTQ persons from their staff. J.A. 90, 99. The SAUs serving the towns in which the Petitioners live do not contract for secondary school privileges with any schools, public or private. J.A. 71. This means that, should sectarian schools be allowed to participate in the tuition assistance program in these SAUs, public funds would be paid directly to those schools.

SUMMARY OF ARGUMENT

Maine's tuition assistance program fully complies with the Free Exercise Clause. When approving additional schools to provide education in SAUs that do not maintain their own secondary schools, Maine aims to recreate the free public education available everywhere else in the state. This public benefit is administered on a neutral basis and is narrowly tailored to allow schools providing an equivalent public education, including some private schools with nominal religious affiliations, to be eligible. What Petitioners want is not the free public education offered, but special treatment to receive an entirely different kind of benefit outside the scope of

the program—a religious education. History and this Court's precedent hold that a religious education is inconsistent with the aims of public education. Schools that self-identify as inculcating specific religious beliefs while authorizing intolerance and the exclusion of some minority students and families from the polity are wholly antithetical to the provision of public education.

Instead, Maine's tuition program is an example of a use-based rather than status-based distinction because it focuses on what the tuition assistance payments will be used for. Maine's law does not interfere with the right of families to send their children to religious schools, and the Free Exercise Clause does not compel states to subsidize religious education with public tax dollars. Even if the Court were to find that the Free Exercise Clause is implicated by a use-based distinction, Maine's tuition program satisfies strict scrutiny because it is narrowly tailored to achieve Maine's compelling state interest in maintaining a secular public education system that is guided by principles of neutrality, tolerance, and diversity.

ARGUMENT

I. Maine's Tuition Assistance Program Does Not Violate the Free Exercise Clause

A. Maine's Tuition Assistance Program Does Not Discriminate Based on Religious Status and is Subject to a Rational Basis Review

i. Maine's tuition program does not discriminate based on religious status

Maine's tuition program does not violate the Free Exercise Clause because Maine's statute is facially neutral. Me. Rev. Stat. Ann. Tit. 20-A, § 2951 addresses

the requirements for a private school to be approved to receive public funds for tuition purposes. In addition to meeting basic school approval requirements such as complying with immunization standards and teaching Maine studies and Maine Native American history, § 2951(2) specifies that private schools seeking approval must be "nonsectarian school[s] in accordance with the First Amendment of the United States Constitution." Me. Rev. Stat. Ann. Tit. 20-A, § 2951(2), §2902(1), §4706. By using the word "nonsectarian" instead of a term like non-religious and the phrase "in accordance with the First Amendment," Maine's statute implements a lawful, neutral standard by which as many schools as possible, including some private schools with religious affiliation, can be eligible for the program. Maine's statute is not concerned with schools that may be operated by or nominally affiliated with religious institutions—its primary goal is to ensure approved schools offer instruction that parallels the free public education available in other SAUs.

Due to this neutrality, Maine's statute is compliant with this Court's holding in Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) and Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246 (2020) because it does not exclude private schools based on their religious character or status. The decisions in Trinity Lutheran and Espinoza both turn on a critical feature of status-based exclusion, namely that a decision is based solely on an aid recipient's affiliation with or control by a religious institution. In Trinity Lutheran, this Court held that disqualifying a religious school from a construction grant "solely because of [its] religious character" imposes "a penalty on the free exercise of religion that triggers

the most exacting scrutiny." 137 S.Ct., at 2021. Similarly, in Espinoza, the exclusion of a religious school from a tax credit under Montana's no-aid provision solely because of religious status triggered a high level of scrutiny. 140 S. Ct. 2246, 2249 (2020).

The strict level of scrutiny applied in Trinity Lutheran and Espinoza is not activated here because no comparable status-based distinction is being made. It is important to note that the Montana statute at issue in Espinoza was far stricter than the law at issue in this case, as it barred aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools," specifically excluding religious institutions and leaving no room for flexibility. 140 S. Ct. 2246, 2255 (2020). As mentioned above, Maine's tuition assistance program does not exclude religious schools *in toto*, in fact, it is designed to allow schools that might be religiously affiliated to qualify for eligibility as long as they provide a nonsectarian education. In other words, religious affiliation is a consideration when deciding eligibility for the tuition program, but affiliation itself is not ultimately dispositive of suitability. Maine's statute cannot be discriminatory because of religious status because it does not predicate eligibility for public dollars on a school's religious character. Rather, it declines to subsidize pervasively religious schools based the curriculum implemented and how these schools would use the tuition benefit.

ii. Maine's tuition program determines eligibility based on use of funds

The Court in Espinoza clarified that discrimination based solely on religious "status" is distinct from discrimination based on religious "use." Id. The Court explained that, like Trinity Lutheran, Espinoza "turn[ed] expressly on religious status and not religious use." 140 S. Ct. at 2256. As applied to this case, Trinity Lutheran and Espinoza are only guiding to the extent that they point to a use-based distinction. According to Maine's Department of Education, determinations of Section 2951 approval focus on how material is presented and what schools teach through their curriculum and related activities. Carson v. Makin, 979 F.3d 21, 42 (1st Cir. 2020). Thus, certain schools are excluded, not because of who they are, but because of how they would *use* funds to administer a curriculum that substantially deviates from educational standards in Maine and is meaningfully different than the kind offered at all other public schools Maine operates.

This sort of use-based distinction is permissible and supported by the Court's precedent in Locke v. Davey, where the Court found no Free Exercise violation in a Washington law that barred state scholarship aid from being used for a devotional theology degree. 540 U.S. 712 (2004). In Trinity Lutheran, the Court highlights Locke to emphasize the difference between status and use, describing that "Davey was not denied a scholarship because of who he was… but what he proposed to do– use the funds to prepare for the ministry." 137 S. Ct. at 2023. Here, Maine's desire to preclude the imposition of specific religious doctrines in secondary-school students finds parallel in Washington's decision to decline funding for a "religious education for the ministry." Id. at 2023. Under Locke, Maine does not burden Free

Exercise when it denies funding to pervasively religious instruction, because it "merely [chooses] not to fund a distinct category of instruction." Id. at 720-21.

Petitioners may argue that Locke's holding was narrowly limited to a ban on training the clergy and that a use-based exception should not apply given that Locke did not determine whether the state scholarship being applied generally at a religious college would pose an issue. 540 U. S., at 724–725. However, nothing about Locke suggests that a state's interest in declining funding for theological studies is the only category that would qualify as a use-based exception. While Petitioners may argue Locke is predicated on Washington's "historic and substantial" state interest, Maine's own substantial interest in its system of public education is equally compelling grounds to decline funding pervasively religious secondary education.

Locke upheld Washington's bar on funding for religious use despite the Court having "no doubt that the State could, consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology." Id. at 719. The Court explained that the State's discretion to impose funding restrictions captures the "play in the joints" between the Free Exercise Clause and the Establishment Clause, whereby states *may* fund some religious endeavors without running afoul of the Establishment Clause, but are not *compelled* to do so under the Free Exercise Clause. Id. at 718. The Court's established principle of a "play in the joints" is dispositive in this case: a mere denial of funding does not on its own create